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OF THE INCORPORATED COUNCIL OF LAW REPORTING

QUEEN'S BENCH DIVISION

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL,

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THE COURT OF CRIMINAL APPEAL

EDITOR - - - R. P. COLINVAUX,
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1953—Vol. II.

PUBLISHED BY THE COUNCIL AT ITS OFFICE, 3 STONE BUILDINGS,
LINCOLN'S INN, LONDON, W.C.2,
AND
PRINTED BY THE EASTERN PRESS, LTD., LONDON AND READING

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FOR

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London and North Eastern Railway Co. *v.* Berriman	[1946] A.C. 278; 62 T.L.R. 170; [1946] 1 All E.R. 255		122
London County Council *v.* Wandsworth Borough Council	[1903] 1 K.B. 797; 19 T.L.R. 372		89
London Graving Dock Co. *v.* Horton	[1951] A.C. 737	*R.*	235, 238
Lochgelly Iron and Coal Co. Ld. *v.* M'Mullan	[1934] A.C. 1	*R.*	328
London and Provincial Properties *v.* Reuben	[1947] K.B. 157	*R.*	357
London School Board *v.* Northcroft	Hudson's Building Contracts, 4th ed., vol. 2, p. 147	*R.*	293
Lougher *v.* Donovan	[1948] W.N. 236	*R.*	350
Lovell & Christmas Ld. *v.* Wall	104 L.T. 85; 27 T.L.R. 236	*R.*	462
Lucas *v.* Lucas	[1943] P. 68		488
Machado *v.* Fontes	[1897] 2 Q.B. 231		331
Mackay *v.* Lord Advocate	1937 S.C. 860	*C.*	483, 500
Madeleine Vionnet et Cie *v.* Wills	[1940] 1 K.B. 72		331
M'Gillivray *v.* Hope	[1935] A.C. 1	*R.*	525
McRae *v.* Commonwealth Disposals Commission	84 C.L.R. 377	*R.*	460
Marshall *v.* London Passenger Transport Board	[1936] 3 All E.R. 83	*Dist.*	318, 328
Mauray *v.* Durley Chine (Investments) Ld.	[1953] 1 W.L.R. 524	*Aff.*	433
Mead *v.* Chelmsford Rural District Council	[1953] 1 Q.B. 32; [1952] 2 T.L.R. 700; [1952] 2 All E.R. 723		181
Mechanical and General Inventions Co. Ld. and Lehwess *v.* Austin and the Austin Motor Co. Ld.	[1935] A.C. 346	*Appl.*	204, 207
Mehmet Dogan Bey *v.* G. G. Abdeni & Co. Ld.	[1951] 2 K.B. 405		378
Merest *v.* Harvey	(1814) 5 Taunt. 442	*Appl.*	204, 209
Merlihan *v.* A. C. Pope Ld.	[1946] K.B. 166	*D.*	503, 511, 519, 523
Merrick *v.* Lenihan	156 Estates Gazette 68	*R.*	362
Mersey Docks and Harbour Board *v.* Coggins and Griffith (Liverpool) Ld.	[1947] A.C. 1; 62 T.L.R. 533; [1946] 2 All E.R. 345	*R.*	188
Metropolitan Water Board *v.* Dick, Kerr & Co.	[1918] A.C. 119		541
Middleton *v.* Baldock	[1950] 1 K.B. 657	*C.*	425, 429
Miller, Gibb & Co. *v.* Smith & Tyrer Ld.	[1917] 2 K.B. 141; 33 T.L.R. 295		172
Miller *v.* William Boothman & Sons Ld.	[1944] K.B. 337		469, 472
Minister of Food *v.* Reardon Smith Line Ld.	[1951] 2 T.L.R. 1158		380
Moodie *v.* Hosegood	[1952] A.C. 61	*R.*	351
Montague *v.* Lieut.-Governor of Van Diemen's Land	6 Moo.P.C. 489		489
Morgan *v.* Ashmore, Benson, Pease & Co. Ld. and Samuel Fox & Co. Ld.	[1953] 1 W.L.R. 418	*C.*	503, 519, 526
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Nicholls *v.* F. Austin (Leyton) Ld.	[1946] A.C. 493	*R.*	474
Oil Products Trading Co. Ld. *v.* S.A. Société de Gestion d'Entreprises Coloniales	150 L.T. 475	*R.*	244
Old Gate Estates Ld. *v.* Alexander	[1950] 1 K.B. 311	*C.*	425, 429
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Osgood *v.* Nelson	L.R. 5 H.L. 636		31
Ottoman Bank *v.* Jebara	[1928] A.C. 269		537
Overseers of the Poor of Walsall *v.* London and North Western Railway Co.	4 App.Cas. 30		31
Page *v.* Burtwell	[1908] 2 K.B. 758	*R.*	516
Parkinson (Sir Lindsay) & Co. Ld. *v.* Commissioners of H.M. Works and Public Buildings	[1949] 2 K.B. 632		440
Parvin *v.* Morton Machine Co.	1950 S.C. 371	*R.*	107
Pasmore *v.* Whitbread & Co. Ld.	[1953] 2 W.L.R. 359; [1953] 1 All E.R. 361	*Appl.*	127, 132
Penny *v.* Wimbledon Urban District Council and Iles	[1898] 2 Q.B. 212	*R.*	125
Perrins *v.* Perrins	[1951] 2 K.B. 414; [1951] 1 T.L.R. 945; [1951] 1 All E.R. 1075		181
Phillips *v.* Eyre	L.R. 6 Q.B. 1	*R.*	338
Pike *v.* Ongley	18 Q.B.D. 708; 3 T.L.R. 549		172
Pillans *v.* Van Mierop	3 Burr. 1663	*C.*	483, 498
Polemis & Furniss, Withy & Co., *In re*	[1921] 3 K.B. 560	*R.*	335
Porter *v.* Freudenberg	[1915] 1 K.B. 857		538
Potter *v.* New Zealand Shipping Co.	1 Com.Cas. 114	*R.*	386
Praed *v.* Graham	24 Q.B.D. 53	*Appl.*	203, 207
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Rann *v.* Hughes	7 Term R. 348, 350n.		307
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Rawlance *v.* Croydon Corporation	[1952] 2 Q.B. 803; [1952] 2 T.L.R. 460; [1952] 2 All E.R. 535		87
Reading *v.* Attorney-General	[1951] A.C. 507		539
Rederiaktiebolaget Amphitrite *v.* Rex	[1921] 3 K.B. 500		488
Rees *v.* Marquis of Bute; Davies *v.* Marquis of Bute	[1916] 2 Ch. 64		440
Reg. *v.* Newent Justices	4 L.T.(o.s.) 289		347
Reg. *v.* East Kerrier Justices, *Ex p.* Mundy	[1952] 2 Q.B. 719	*E.*	403, 405, 407
Reilly *v.* The King	[1934] A.C. 176	*R.*	499
Rex *v.* Fleet	Cald.Mag.Cas. 31	*F.*	304, 314
Rex *v.* Fulham, Hammersmith and Kensington Rent Tribunal, *Ex p.* Gormly	[1952] 1 K.B. 179; [1951] 2 T.L.R. 1037; [1951] 2 All E.R. 1030	*F.*	148, 150
Rex *v.* Fulham, Hammersmith and Kensington Rent Tribunal, *Ex p.* Gormly	[1952] 1 K.B. 179	*R.*	439

Rex *v.* Hampstead and St. Pancras Rent Tribunal, *Ex p.* Goodman	[1951] 1 K.B. 541; [1951] 1 T.L.R. 37; [1951] 1 All E.R. 170		32
Rex *v.* Hobson	29 Cr.App.R. 30	*R.*	392
Rex *v.* Justices of Bodmin, *Ex p.* McEwen	[1947] K.B. 321		404
Rex *v.* Lovitt	[1912] A.C. 212		532
Rex *v.* Nat Bell Liquors Ld.	[1922] A.C. 128; 38 T.L.R. 541		32
Rex *v.* Neal	[1949] 2 K.B. 590	*R.*	392
Rex *v.* Nicholson (No. 2)	32 Cr.App.R. 127	*R.*	392
Rex *v.* Northumberland Compensation Appeal Tribunal, *Ex p.* Shaw	[1952] 1 K.B. 338; [1952] 1 T.L.R. 161; [1952] 1 All E.R. 122		30
Rex *v.* Reason	6 Term R. 375		404
Rex *v.* St. Peters-on-the-Hill	2 Bott's Poor Laws 367	*F.*	304, 314
Rex *v.* Taylor, Rex *v.* Amendt	[1915] 2 K.B. 593		258
Rex *v.* Taylor (*Ex p.* Attorney-General), Rex *v.* Amendt (*Ex p.* Attorney-General)	31 T.L.R. 317		258
Rex *v.* Thomas	32 Cr.App.R. 50		15
Rex *v.* Tremayne	23 Cr.App.R. 191	*R.*	392
Richardson *v.* Richardson and National Bank of India	[1927] P. 228		536
Robertson *v.* Minister of Pensions	[1949] 1 K.B. 227		488
Robinson *v.* Harman	1 Ex. 850	*R.*	335
Robinson *v.* Harkin	[1896] 2 Ch. 415	*R.*	519
Robson *v.* Premier Oil and Pipe Line Co.	[1915] 2 Ch. 124	*R.*	563
Rodwell *v.* Thomas	[1944] K.B. 596	*R.*	497
Rose (Frederick E.) (London) Ld. *v.* William H. Pim Jnr. & Co. Ld.	[1953] 1 Lloyd's Rep. 84	*Rev.*	451
Royal Bank of Canada *v.* Reg.	[1913] A.C. 283	*R.*	552
Royal Greek Government *v.* Minister of Transport	66 T.L.R. (Pt. 1) 504	*R.*	388
Ryder *v.* Woodley	10 W.R. 294	*R.*	460
Salomon *v.* Salomon & Co. Ld.	[1897] A.C. 22		276
Schering Ld. *v.* Stockholms Enskilda Bank Aktiebolag	[1946] A.C. 219	*C. & Appl.*	528, 553, 556, 557, 560, 566, 568, 576, 577
Sea and Land Securities Ld. *v.* W. Dickinson & Co. Ld.	[1942] 2 K.B. 65		377
Seligman *v.* Eagle Insurance Co.	[1917] 1 Ch. 519		537
Sheldon *v.* Brown Bayley's Steel Works Ld. and Dawnays Ld.	[1953] 1 W.L.R. 875	*Rev.*	393
Shelley *v.* London County Council	[1949] A.C. 56		346
Shenton *v.* Smith	[1895] A.C. 229	*R.*	497, 500
Sherwood *v.* Moody	[1952] 1 T.L.R. 450; [1952] 1 All E.R. 389		89
Shipley U.D.C. *v.* Bradford Corporation	[1936] 1 Ch. 375	*R.*	461
Simmons *v.* Liberal Opinion Ld., *In re* Dunn	[1911] 1 K.B. 966		276
Sinclair *v.* Brougham	[1914] A.C. 398		539
Skinner *v.* Geary	[1931] 2 K.B. 546; 47 T.L.R. 597	*R.*	159, 160
Smith *v.* Charles Baker & Sons	[1891] A.C. 325; 7 T.L.R. 679	*R.*	200
Smith *v.* Jeffryes	15 M. & W. 561	*R.*	462
Smith *v.* Morris Motors Ld.	[1950] 1 K.B. 194; 65 T.L.R. 642; [1949] 2 All E.R. 715	*R.*	109
Smith *v.* Selwyn	[1914] 3 K.B. 98	*R.*	516

Smith's Dock Co. *v.* Redhead & Sons	[1912] 2 K.B. 323	*R.*	512
Smurthwaite *v.* Hannay	[1894] A.C. 494		395
Solle *v.* Butcher	[1950] 1 K.B. 671	*R.*	460
Spackman *v.* Plumstead Board of Works	10 App.Cas. 229		31
Strathlorne Steamship Co. Ld. *v.* Andrew Weir & Co.	40 Com.Cas. 168	*R.*	388
Summers *v.* Salford Corporation	[1943] A.C. 283		4
Sutherland *v.* Administrator of German Property	[1934] 1 K.B. 423		534
Tatem Steam Navigation Co. *v.* Anglo-Canadian Shipping Co. Ld.	53 Ll.L.Rep. 161		380
Taylor *v.* Caldwell	3 B. & S. 826		541
Temple Steamship Co. Ld. *v.* V/O Sovfracht	79 Ll.L.Rep. 1		379
Tetlow *v.* Orela Ld.	[1920] 2 Ch. 24	*R.*	277, 283
Thurogood *v.* Van Den Berghs & Jurgens Ld.	[1951] 2 K.B. 537; [1951] 1 T.L.R. 557; [1951] 1 All E.R. 682	*R.*	106
Tideway Investment and Property Holdings Ld. *v.* Wellwood	[1952] Ch. 791	*R.*	356
Toronto Railway Co. *v.* Corporation of the City of Toronto	[1904] A.C. 809	*R.*	43
Trans Trust S. P. R. L. *v.* Danubian Trading Co. Ld.	[1952] 2 Q.B. 297		332
Tuckwood *v.* Rotherham Corporation	[1921] 1 K.B. 526	*C.*	502, 512, 520, 524, 525, 526
Union Corporation Ld. *v.* Commissioners of Inland Revenue	[1952] 1 T.L.R. 651		534
United States of America *v.* Motor Trucks Ld.	[1924] A.C. 196		455
Universal Steam Navigation Co. Ld. *v.* James McKelvie & Co.	[1923] A.C. 492; 39 T.L.R. 480	*F.*	168, 177
Vanderspar *v.* Duncan & Co.	8 T.L.R. 30	*Q.*	374, 381, 385–7
Varnish (W. R.) & Co. Ld. *v.* "Kheti" (Owners)	82 Ll.L.Rep. 525	*Dist.*	295, 301
Wabe *v.* Taylor	[1952] 2 Q.B. 735		427
Walker *v.* Bradford Old Bank	12 Q.B.D. 511	*R.*	548
Waterman *v.* Fryer	[1922] 1 K.B. 499	*Dist.*	305, 311
Williams *v.* Portman	[1951] 2 K.B. 948	*F.*	227, 229, 231
Williams *v.* Portman	[1951] 2 K.B. 948; [1951] 2 T.L.R. 526; [1951] 2 All E.R. 539	*Appl.*	127, 132
Winstone *v.* Linn	1 B. & C. 460		310
Willis *v.* Gipps	5 Moo.P.C. 379	*R.*	499
Wolmerhausen *v.* Gullick	[1893] 2 Ch. 514	*R.*	519
Wise *v.* Wilson	1 C. & K. 662		310
Wood *v.* Fenwick	10 M. & W. 195	*R.*	115
Yates *v.* Morris	[1951] 1 K.B. 77		346
Yeap Cheah Neo *v.* Ong Cheng Neo	L.R. 6 P.C. 381	*R.*	493

STATUTES JUDICIALLY CONSIDERED

1700

Act of Settlement, 1700 (12 & 13 *Will.* 3, *c.* 2), *s.* 3 - **Lord Goddard C.J. 482**

1814

Apprentices Act, 1814 (54 *Geo.* 3, *c.* 96), *s.* 2. **C.A. 304**

1838

Small Tenements Recovery Act, 1838 (1 & 2 *Vict. c.* 74), *s.* 1 - - **C.A. 341**

1866

Straits Settlements Act, 1866 (29 & 30 *Vict. c.* 115), *ss.* 2, 3 **Lord Goddard C.J. 482**

1879

Summary Jurisdiction Act, 1879 (42 & 43 *Vict. c.* 49), *s.* 17 - - **C.C.A. 14**

1881

Army Act, 1881 (44 & 45 *Vict. c.* 58), *s.* 53 **C-M.A.C. 364**

1910

Licensing (Consolidation) Act, 1910 (10 *Edw.* 7 & 1 *Geo.* 5, *c.* 24), *s.* 64 (1), (3) **Divl.Ct. 257**

1911

Perjury Act, 1911 (1 & 2 *Geo.* 5, *c.* 6), *s.* 5 (*b*) - - - - **C.C.A. 14**

1920

Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 *Geo.* 5, *c.* 17), *s.* 12 (1) (*g*) **C.A. 341**

—— —— *ss.* 12 (1) (*g*), 17 (2) - **C.A. 407**

—— —— *s.* 15 (1) - - - **C.A. 153**

1923

Rent and Mortgage Interest Restrictions Act, 1923 (13 & 14 *Geo.* 5, *c.* 32), *s.* 4 (2) (4) - - - - **C.A. 341**

1924

Carriage of Goods by Sea Act, 1924 (14 & 15 *Geo.* 5, *c.* 22), *s.* 1, *art.* 1 (*c*), III, *rr.* 2, 8, *IV*, 2 - - **Pilcher J. 295**

1925

Rating and Valuation Act, 1925 (15 & 16 *Geo.* 5, *c.* 90), *s.* 22 (1) (*a*) **C.A. 69**

1927

Landlord and Tenant Act, 1927 (17 & 18 *Geo.* 5, *c.* 36), *ss.* 4 (1), 5, 25 **C.A. 126**

—— —— *ss.* 4 (1), 5 (1) *and* 25 - **C.A. 226**

1933

Administration of Justice (Miscellaneous Provisions) Act, 1933 (23 & 24 *Geo.* 5, *c.* 36), *s.* 2 (2) - - - **C.C.A. 14**

1933

Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (23 & 24 *Geo.* 5, *c.* 32), *s.* 3 (1) *and Sch.* 1, *para.* (*h*) - - - - **C.A. 211**

1934

Betting and Lotteries Act, 1934 (24 & 25 *Geo.* 5, *c.* 58), *s.* 13 (1) (2) - **C.A. 190**

1934

County Courts Act, 1934 (24 & 25 *Geo.* 5, *c.* 53), *s.* 90 - - - **C.A. 407**

1935

Law Reform (Married Women and Tortfeasors) Act, 1935 (25 & 26 *Geo.* 5, *c.* 30), *s.* 6 (1) (*c*) - - **C.A. 501**

1936

Housing Act, 1936 (26 *Geo.* 5 & 1 *Edw.* 8, *c.* 51), *s.* 9 - - - **C.A. 1**

1937

Factories Act, 1937 (1 *Edw.* 8, & 1 *Geo.* 6, *c.* 67), *ss.* 12, 13, 14, 16 - **C.A. 95**

—— —— *s.* 14 (1) - - - **C.A. 464**

1938

Food and Drugs Act, 1938 (1 & 2 *Geo.* 6, *c.* 56), *s.* 83 (3) - - **Divl.Ct. 266**

1939

Limitation Act, 1939 (2 & 3 *Geo.* 6, *c.* 21), *s.* 2 (4) - - - - **C.A. 341**

—— —— *ss.* 2, 21 (1) (2) - - **C.A. 501**

—— —— *s.* 21 (1) - - - **C.A. 318**

1944

Middlesex County Council Act, 1944 (7 & 8 *Geo.* 6, *c.* xxi), *s.* 260 (1) (2) **C.A. 1**

1946

Furnished Houses (Rent Control) Act, 1946 (9 & 10 *Geo.* 6, *c.* 34), *ss.* 2, 4 (1), 9 **C.A. 433**

—— —— *s.* 2 (3) - - - **Divl.Ct. 147**

1947

Town and Country Planning Act, 1947 (10 & 11 *Geo.* 6, *c.* 51), *ss.* 19 (1), 119 (1) **Divl.Ct. 83**

—— —— *ss.* 23, 75 **Divl.Ct. 178**

1948

British Nationality Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 56), *s.* 3 (2) **Divl.Ct. 77**

Criminal Justice Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 58), *ss.* 8, 12 (1) **C.C.A. 390**

Law Reform (Personal Injuries) Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 41), *s.* 2 (1) **Slade J. 92**

National Service Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 64), *s.* 34 (4) **Divl.Ct. 77**

1949

Ireland Act, 1949 (12 *&* 13 *Geo.* 6, *c.* 41), *s.* 3 (1), (2) **Divl.Ct. 77**

Landlord and Tenant (Rent Control) Act, 1949 (12 *&* 13 *Geo.* 6, *c.* 40), *s.* 1 **Divl.Ct. 425**

Patents Act, 1949 (12, 13 *&* 14 *Geo.* 6, *c.* 87), *ss.* 41 (1), 45 (3) **C.A. 48**

Vehicles (Excise) Act, 1949 (12, 13 *&* 14 *Geo.* 6, *c.* 89), *s.* 9 (1) **C.C.A. 14**

1950

Arbitration Act, 1950 (14 *Geo.* 6, *c.* 27), *s.* 4 (1) **McNair J. 112**

STATUTORY RULES, ORDERS AND INSTRUMENTS JUDICIALLY CONSIDERED

Building (Safety, Health and Welfare) Regulations, 1948 (*S.I.* 1948, *No.* 1145), *regs.* 4, 31 **C.A. 117**

Dock Workers (Regulation of Employment) Order, 1947 (*S.R. & O.* 1947, *No.* 1189) **C.A. 18**

Docks Regulations, 1934 (*S.R. & O.* 1934, *No.* 279), *regs.* 3, 12, 43. **McNair J. 184**

Increase of Rent and Mortgage Interest (Restrictions) Rules, 1920 (*S.R. & O.* 1920, *No.* 1261/L 37), *rr.* 1, 7, 19 **C.A. 407**

Pre-Packed Food (Weights and Measures: Marking) Order, 1950 (*S.I.* 1950, *No.* 1125), *art.* 6 (1) (3) **Divl.Ct. 168**

Rules of Procedure, 1947, *rr.* 56, 66. **C-M.A.C. 364**

R.S.C. Ord. 2, *r.* 1 **C.A. 318**

—— *Ord.* 3, *rr.* 1, 2, 3 **C.A. 318**

—— *Ord.* 4, *r.* 1 **C.A. 271**

—— *Ord.* 8, *r.* 1 **C.A. 393**

—— *Ord.* 16, *r.* 2 **C.A. 271**

—— *Ord.* 20, *r.* 4 **C.A. 318**

—— *Ord.* 70, *r.* 1 **C.A. 393**

Woodworking Machinery Regulations, 1922 (*S.R. & O.* 1922, *No.* 1196), *reg.* 17 **C.A. 464**

INTERNATIONAL INSTRUMENTS JUDICIALLY CONSIDERED

International Convention for the Protection of Industrial Property, 1934 (1938, *Cmd. No.* 5833) *Treaty Series No.* 55 (1938), *Art.* 5A (4) **C.A. 48**

ERRATA

[1953] 1 Q.B. p. 507. *For* "Criminal Justice Act, 1948," *read* "Criminal "Evidence Act, 1898, s. 1 (*a*)."

Ibid. p. 545. *For* "M. Leitman," *read* "M. Littman."

CASES
DETERMINED BY THE
QUEEN'S BENCH DIVISION
OF THE
HIGH COURT OF JUSTICE
AND BY THE
COURT OF APPEAL
ON APPEAL THEREFROM
AND BY THE
COURT OF CRIMINAL APPEAL

LESLIE MAURICE & CO. LD. *v.* WILLESDEN CORPORATION.

C. A.

1953
Mar. 26, 27.

Evershed M.R., Jenkins and Hodson L.JJ.

[Plaint No. H. 1540.]

Housing—Unfit for human habitation—Service of notice requiring execution of works under general and local Act—Form of notice—Person having control a lessee when notice served—Freehold acquired before hearing—Date for determining whether works can be executed at reasonable expense—Housing Act, 1936 (26 *Geo.* 5 *&* 1 *Edw.* 8, *c.* 51), *s.* 9*—Middlesex County Council Act,* 1944 (7 *&* 8 *Geo.* 6, *c. xxi*), *s.* 260 (1) (2).

By the Middlesex Council Council Act, 1944, s. 260 (1): "For the purpose of Part II of the Housing Act, 1936, any "dwelling-house . . . the person having control of which fails "to keep such dwelling-house sufficiently repaired and painted ". . . so as to secure reasonable amenities for the occupier or "occupiers shall be deemed to be a house not in all respects fit "for human habitation and the powers of the local authority "under the said Part II shall apply in respect of such dwelling-"house accordingly"; by subsection (2): "On an appeal to the "county court by the person having control of a dwelling-house "upon whom the local authority have served notice under "section 9 of the Housing Act, 1936, in consequence of his "failure to comply with the provisions of this section the county "court judge shall take into consideration" four matters, one being the length of the unexpired portion of the lease, if the person on whom the notice is served is a lessee or agent for a lessee.

C. A.

1953

LESLIE MAURICE & CO. LD. v. WILLESDEN CORPORATION.

The appellants, the Willesden Corporation, on June 27, 1952, served a notice on the respondents as "the person having control" of a dwelling-house in the county of Middlesex and within the ambit of the Act of 1944, stating that the corporation were satisfied that the dwelling-house was unfit for human habitation, that they were not satisfied that it was incapable at reasonable expense of being rendered fit for human habitation, and "that "in pursuance of subsection (1) of section 9 of the Housing "Act, 1936, and section 260 of the Middlesex County Council Act, "1944, the council require you within a period of 42 days . . . "to execute the following works, which will in the opinion of "the council render the house fit for human habitation, namely, "as specified on the attached schedule." The works enumerated in the schedule did not distinguish between works required to satisfy the provisions of section 9 of the Act of 1936, and those required to satisfy the amenity standard laid down by section 260 of the Act of 1944. The cost of complying with the works was estimated to be £350.

The respondents appealed against that notice. On June 27, 1952, when the notice was served, they were collecting the rents of the dwelling-house on behalf of a limited company who held the premises for an unexpired term of 31 years. On August 21 that company entered into a binding contract to purchase the freehold reversion, and on October 30, 1950, the reversion was conveyed to them. The appeal came on for hearing in the county court on October 28, and was finally disposed of on December 1, after the freehold reversion had become vested in the company. The county court judge dealt with the matter on the footing that the company were lessees having a 31 years' term and, on that footing, allowed the appeal on the ground that the dwelling-house could not be rendered fit for habitation at reasonable expense, and he quashed the order. On appeal:—

Held, first, that the Willesden Corporation, having rightly served a notice expressed to be both under the Act of 1936 and under the Act of 1944, the respondents were entitled to raise all the special defences open to them under section 260 (2) of the Act of 1944 in respect of the whole of the works. Secondly, that the date upon which the county court judge was enjoined by section 260 (2) of the Act of 1944 to consider the special defences was the date when he heard the case, at which date the company were the absolute freehold owner and the length of the lease held by them at the date of the service of the notice had become irrelevant. Thirdly, that the judge should therefore have found in favour of the corporation.

Appeal allowed.

APPEAL from Judge Sir Henry Braund sitting at Willesden County Court.

The respondents, Leslie Maurice & Co. Ld., were collecting the rents of No. 39 Chaplin Road, premises situate in the county of Middlesex, and it was not disputed that they were accordingly "the persons having control of the house" within the definition in subsection (4) of section 9 of the Housing Act, 1936.[1] The respondents were collecting the rents of the premises on behalf of Connaught Estates Ld., who on June 27, 1952, held the premises for an unexpired term of 31 years. On that day the appellants, the Willesden Corporation, served a notice, expressed to be in the matter of No. 39 Chaplin Road, on the respondents as the persons having control, in the following terms: "To Leslie Maurice & "Co. Ld., the person having control of the house. Take notice "(1) That the Corporation of Willesden are satisfied that the "above-mentioned house is unfit for human habitation in certain "respects; (2) That the council are not satisfied that it is incapable at reasonable expense of being rendered fit for human "habitation; (3) That in pursuance of subsection (1) of section 9 "of the Housing Act, 1936, and section 260 of the Middlesex "County Council Act, 1944, the council require you within a "period of 42 days ending on August 8, 1952, to execute the "following works, which will in the opinion of the council render "the house fit for human habitation, namely, as specified on the "attached schedule." There then follow a number of items, which may fairly be described as similar to the specified items commonly seen in a notice of dilapidations.

The respondents appealed against the order contained in that notice to the county court under the power conferred by subsection (2) of section 260 of the Middlesex County Council Act, 1944.[2]

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[1] Housing Act, 1936, s. 9 (1): "Where a local authority, . . . are "satisfied that any house which is "occupied, or is of a type suitable for "occupation, by persons of the working classes is in any respect unfit "for human habitation, they shall, "unless they are satisfied that it is "not capable at a reasonable expense "of being rendered so fit, serve upon "the person having control of the "house a notice requiring him, within "such reasonable time, not being less "than 21 days, as may be specified "in the notice, to execute the works "specified in the notice and stating "that, in the opinion of the authority, "those works will render the house "fit for human habitation."

Subs. (3): "In determining for the "purposes of this Part of this Act "whether a house can be rendered fit "for human habitation at a reasonable expense, regard shall be had "to the estimated cost of the works "necessary to render it so fit and the "value which it is estimated that the "house will have when the works are "completed."

[2] Middlesex County Council Act, 1944, s. 260 (1): "For the purposes "of Part II of the Housing Act, 1936, "any dwelling-house which is occupied "or is of a type suitable for occupation "by persons of the working classes "the person having control of which "fails to keep such dwelling-house "sufficiently repaired and painted and "the interior surface of the walls "thereof sufficiently papered or distempered with washable distemper "of a suitable quality so as to prevent "the dilapidation thereof and so as "to secure reasonable amenities for "the occupier or occupiers shall be "deemed to be a house not in all

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On August 21, 1952, the Connaught company entered into a binding contract to purchase the freehold reversion of the premises which was duly conveyed to them pursuant to that contract on October 30, 1950.

The appeal first came on for hearing in the county court on October 28 and was finally disposed of on December 1, after the freehold reversion had become vested in the Connaught company. The county court judge quashed the order contained in the notice of June 27, 1952, on the ground that it would cost £350 to comply with that order and that the expenditure of that sum was not reasonable. He reached this conclusion on the footing that the Connaught company held the premises for a term of 31 years.

The Willesden Corporation appealed.

Heathcote-Williams Q.C. and *Norman King* for the Willesden Corporation. The judge has not found the notice of June 27, 1952, served by the corporation was a bad notice. The works which were required to be done were works necessary to make the premises reasonably fit for habitation in accordance with the provisions of section 9 of the Housing Act, 1936. Accordingly, the respondents were not entitled to rely on the special defences in subsection (2) of section 260 of the Middlesex County Council Act, 1944. Those defences are only available in case of works required to comply with the amenity standard laid down in subsection (1) of section 260 and the judge was wrong in considering the special defences at all, since it was never established what part, if any, of the work was amenity repairs only. [They referred to *Summers* v. *Salford Corporation* [3]; *Bacon* v. *Grimsby Corporation.* [4]]

Secondly, it is submitted that the judge was wrong in considering whether the premises could be rendered fit at a reasonable

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"respects fit for human habitation "and the powers of the local authority "under the said Part II shall apply "in respect of such dwelling-house "accordingly."

Subs. (2): "On an appeal to the "county court by the person having "control of a dwelling-house upon "whom the local authority have "served notice under section 9 of the "Housing Act, 1936, in consequence "of his failure to comply with the "provisions of this section the county "court judge shall take into considera-"tion—(*a*) If the person upon whom "the notice is served is a lessee or "agent for a lessee the length of the "unexpired period of the lease; (*b*) "The period for which the dwelling-"house is likely to continue occupied; "(*c*) The expenditure incurred by the "person having control of the house "or the owner during the preceding "three years of the house; (*d*) "Whether the condition of the "dwelling-house is or is not due to "the wilful default or neglect of the "tenant."

[3] [1943] A.C. 283; 59 T.L.R. 78; [1943] 1 All E.R. 68.

[4] [1950] 1 K.B. 272; 65 T.L.R. 709; [1949] 2 All E.R. 875.

expense on the footing that the Connaught company were lessees. The date when he should have considered what was their interest was the date when the case was heard, not the date when the notice was served.

John Stephenson for the respondents was only called on to argue as to the date on which the judge should have considered whether the premises could have been rendered fit at reasonable expense. It is submitted that the material date is the date of the service of the notice. If that is not the date at which the matter has to be determined, the person on whom a notice was served could escape liability by conveying premises to some third party. If the corporation wished to have the matter dealt with on the footing that the Connaught company were the freeholders, they should have served a further notice. There is nothing in either Act which assists in determining what is the relevant date. It is submitted the judge was right in treating the Connaught company's interest as a leasehold interest. It is further submitted that the notice served was a bad notice, since it did not distinguish between the work required to be done under the Act of 1936 and that required under the Act of 1944.

EVERSHED M.R. read section 9 (1) and (3) of the Housing Act, 1936, and continued: If the matter rested solely upon the Housing Act, 1936, it is clear from the terms of subsection (3) that the question for determination, namely, whether the house can be rendered fit for human habitation at a reasonable expense, is one which has to be determined in what has been called an objective way; that is, without regard to any particular circumstances affecting the person who is in control of the premises and the interest which he has. But the matter does not rest on that section alone, for we are concerned in this case with certain premises at No. 39 Chaplin Road, N.W.2, which are situate within the County of Middlesex, so that to them the Middlesex County Council Act, 1944, also applies.

Before I pass to that Act, I should state that the person described as "the person having control of the house" is defined by subsection (4) of section 9 of the Act of 1936 as being the person who receives the rack-rent of the house, whether on his own account or as agent, or who would so receive it if the house were let at a rack-rent. For the purposes of this appeal, there is no question that Leslie Maurice & Co. Ld., the respondents in this court, satisfy the requirements of the definition and are "the person having control" of the premises in suit.

I turn to the Middlesex County Council Act, 1944. The relevant section is section 260 (1). [His Lordship read section 260 (1) and continued:] The effect of that subsection appears to be that, as regards a house in Middlesex, whatever otherwise might be thought to be the effect of its condition, if there has been a failure to maintain it in the way in which the subsection indicates, then it is treated as a house not fit for human habitation, with the consequence, first, that the local authority is bound, if it is not satisfied that it is incapable of being rendered fit at reasonable expense, to serve a notice under that section; and further that they must in that notice state their opinion that the works which the notice specifies will render the house fit for human habitation.

Subsection (2) of section 260 provides: "On an appeal to the "county court by the person having control of a dwelling-house "upon whom the local authority have served notice under "section 9 of the Housing Act 1936 in consequence of his failure "to comply with the provisions of this section the county court "judge shall take into consideration" four items—one being the length of the unexpired portion of the lease if the person on whom the notice is served is a lessee or agent for a lessee.

It will be noticed that section 260 does not itself give any new or distinct power to a local authority to serve a notice. Section 9 of the Act of 1936, as I follow it, works automatically, given the state of facts which is deemed to constitute a want of fitness for human habitation according to subsection (1) of section 260 of the Act of 1944. But this must be added, that if for any reason it appears that the grounds upon which the notice is served are referable to subsection (1) of section 260 of the Act of 1944, then the county court judge, if there be an appeal to him in accordance with the other provisions of the Act of 1936, must take into consideration these other matters which are not purely objective to the premises but relate to the particular circumstances of the lessee or other person on whom the notice is served.

In the present case Willesden Corporation served a notice on Leslie Maurice & Co. Ld. [His Lordship read the notice and continued:] The form of that notice has paid close attention to the obligations imposed on a local authority by section 9 of the Act of 1936. There is no power to serve notice save under section 9 itself, but it will be noticed that in this case there is in the third paragraph of the notice a specific reference to section 260 of the Middlesex Act of 1944.

Looking at the items in the schedule, it is plain that, at any rate to a very large extent, it would be virtually impossible sensibly to sever the works necessary or called for under section 260 of the Middlesex Act exclusively from the rest of what was wanted to be done. If it is required to render, let us say, the interior of a room, which is in a state of decrepitude and dilapidation, into such a condition as is postulated by section 260, then it may be said that the whole of the dilapidations are attributable to a lack of the standard which section 260 postulates, though it might be possible, of course, to say: when you have got thus far, then everything will be all right, except the added amenity which section 260 requires. Take, for example, the landing and staircase. The first paragraph is: "Examine the "ceiling and take down all broken or loose plaster; replaster to "a smooth even surface; cut out and stop all cracks and prepare, "line and whiten the ceiling. Strip, cleanse, stop and either "re-paper or colour-wash the walls." Save that some part is in its nature decorative, that part of the schedule seems to me to cover work which could not, or might not at any rate, be properly referable exclusively to section 260; and the same is true substantially as to the whole schedule.

In the county court, the judge spent some time in considering whether this notice, by failing to distinguish in the schedule that part of the work which was attributable exclusively to the Middlesex Act from the rest, was defective or deceptive or both. He found it unnecessary to express a final conclusion on that matter, because, treating himself as able and bound (and I think that in this respect he was right) to take into consideration, as regards the whole of the work specified, all the matters indicated in subsection (2), or such of them as Leslie Maurice & Co. Ld. here relied on, he came to the conclusion that it was not in fact reasonable to spend the money that would have to be spent in making this house fit for human habitation; and so he made an order accordingly, quashing the order which the corporation had made for doing the work.

In this court, the first point taken on behalf of the corporation was, as I have followed it, that the county court judge should have limited his consideration of the matters which are raised or mentioned in subsection (2) of section 260 of the Middlesex Act to such of the works required to be done as were exclusively related to failure to comply with that Act, and that the judge should have found, either upon his own initiative or (I gather) upon the application of Leslie Maurice & Co. Ld., the proprietors,

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which were those items. Alternatively, the corporation went the length of saying, according to the note of the argument of Mr. Norman King, that none of the items in the schedule were shown to have been attributable, or were attributable, to any defect arising under the Middlesex Act and, therefore, these defences should have been wholly disregarded. I qualified my statement of the point by the words "as I have followed it," for I am exceedingly doubtful if I have. And, if I have failed to understand it, I concede at once that it is my fault. But the point, I regret to say, remains substantially incomprehensible to me. Here, by their own notice, the corporation served a notice in which they called upon the proprietors, the persons having control —I use the word "proprietors" for brevity—to do a certain quantity of work. They required them to do that in pursuance of both the Act of 1936 and the Act of 1944. Evidence was before the county court judge that at any rate some of the work which they were called upon to do was in the nature of decorative repair, prima facie falling within the Middlesex Act. No attempt was made to challenge that evidence in cross-examination. No attempt was made by the corporation to suggest that some part of this work or the whole of it had nothing to do with section 260. Nor, indeed, could they do so, so far as I can see, for they had by their notice in effect stated that for the whole of the work they relied on both the Act of 1936 and the Act of 1944 indifferently.

In my judgment, upon this form of proceeding the proprietors were entitled to raise all the defences open to them under section 260 in respect of the whole of the claim for the whole of the requirements. Alternatively, if it is said that the judge should have found that none, or some only, of the works were attributable to section 260, there was, in my judgment, no evidence on which he could so find. I therefore reject this argument on the part of the corporation. I think that the short answer to it is that, upon the matter as it was constituted by the corporation's own notice, all the defences available under section 260 (2) were available to the proprietors for the whole of the required works. I repeat that I have a fear that I may have failed to apprehend some nicety in the argument and not have done justice to it. I therefore express my view with this qualification, that in the circumstances it is not necessary to express a final and definite opinion upon it, since I think (for reasons which I will state) that the corporation is entitled to succeed on other grounds.

But it will be convenient here to deal with another matter which Mr. Stephenson raised, as he was well entitled to do, on behalf of Leslie Maurice & Co. Ld., namely, that this notice was, on the face of it bad, a point which had attracted the county court judge, though he has not finally expressed a conclusion upon it. Again I am not sure that I apprehend this point either. I have already stated that the effect of the Middlesex Act seems to me to be that for Middlesex houses, given a certain state of facts, then they are deemed to be unfit for human habitation and thereupon the local authority is bound to serve a notice and to serve it under the Act of 1936. If they serve a notice saying that the house is unfit for human habitation and call upon the person in control to do specified works, and leave it at that, the notice on the face of it would appear to me to be good, though it may be open to this challenge, that it is not then apparent whether the corporation is relying on any failure to comply with the Middlesex Act, and therefore would leave the person served in doubt whether he could, or to what extent he could, rely on what I will call the special defences. Another kind of case may be easily imagined, where, apart from failure to comply with section 260, there was no ground, or no ground which seemed sufficiently convincing to the local authority, for asserting that a house was unfit for human habitation. In such a case, if the sole point taken was that there was failure to comply with the amenity qualifications, it would obviously be (to say the least) highly desirable, and might otherwise be deceptive, so to state on the face of the notice, and certainly to avoid serving a notice which referred upon the back of it, in printed language, only to the sections of the Act of 1936. But, whatever might be the circumstances in other cases, it seems to me that in the present case the corporation, I assume quite rightly, and, it seems to me, obviously quite fairly, said in terms: "All these repairs which we call upon you to do we "require by virtue of the Act of 1936 and the Act of 1944 "indifferently." The practical effect, and the only practical effect, is that the whole of the special defences were rendered available to the person having control for the whole of the subject-matter of the schedule. That being the form of the notice, it seems to me that there can be no quarrel with it. It was, in my judgment, a compliance with the statutory requirement and it was in no respect deceptive. With all respect, therefore, to the county court judge, I am unable to share the misgivings he felt as regards this notice. I quite follow that, if the corporation were trying to exclude the special defences from some particular matter in the schedule, then there might be an

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objection that they should have made that point clear on the notice. The answer is, not having done so and having applied section 260 indifferently to everything, the special defences were open upon everything.

I come now to the remaining point, which is a curious one, and I have found it, I confess, troublesome. It is this: on June 27, 1952, when the notice was served upon Leslie Maurice & Co. Ld., the persons having control, their principals, who, I understand are called Connaught Estates, Ld., held only the unexpired part of a term of years in the premises. The unexpired portion was 31 years or thereabouts, but having confidence in the premises, which, at first sight, seems surprising (having regard to the nature of their contentions), the Connaught company contracted to buy the freehold reversion, and it is conceded that on August 21 a binding contract was entered into between the freeholder and the Connaught company. Nay, more, on October 30, 1952, the sale and conveyance of the freehold reversion was completed. At that date, October 30, 1952, there had been a hearing before the county court judge, but, the matter being a little complex, was not finished. The first part of the hearing was on October 28, after the date of the contract but before the completion date. The matter was resumed on December 1, 1952, when indubitably the interest of the Connaught company was no longer that of a lessee, but that of an absolute freehold owner. The question of merger is irrelevant. I should assume the lease did merge; but, whether it did or whether it did not, once they had become freehold owners, and once, indeed, they had acquired an absolute contractual right to the freehold reversion, the lease ceased to be a relevant consideration. I gather that there was no concealment in this respect from the county court judge, but he dealt with it nevertheless on the footing that the Connaught company remained lessees with 31 years left to run.

The first question is: what is the date upon which the county court judge, as enjoined by section 260 of the Act of 1944, is to take into consideration what I have called the special defences? It is said by Mr. Stephenson with force that the right answer is the date on which the proprietor, the person having control, is served, and that subsequent changes in title, etc., do not matter. I have come to the conclusion that that submission ought to be rejected. The county court judge is, after all, not here determining some particular question of fact, in the ordinary sense, as (for example) whether a forfeiture had been incurred at a particular date, or something of that kind. What he has to consider is one of those matters which have many counterparts in other branches of the law, whether something or other is "reasonable," in this case, whether the house can be rendered fit for human habitation at a reasonable expense. If a judge has to consider reasonableness, then prima facie it would appear to me that he should consider all relevant circumstances at the date when he hears the case. I think that in the present instance there are other grounds supporting that view; for example, the second special defence (though it has no relevance in the present case) is expressed to be "the period for which the dwelling-house is "likely to continue occupied." The next is "the expenditure "incurred by the person having control of the house during the "preceding three years." The last is "whether the condition "of the dwelling-house is or is not due to the wilful default or "neglect of the tenant." If those are added to the first of the special defences, which is the length of the unexpired period of the lease, the general impression left on my mind is that the right time to consider all these things is when the judge has to make up his mind: "Aye or no, can this house now, "when I am going to make an order, be put into a state fit for "human habitation at reasonable expense?" One example was given: supposing that some particular calamity fell upon the house between the date of the notice and the date of the hearing, or suppose that there was some change of tenant, so that one who had been in the past scrupulous was replaced by one who was not scrupulous in looking after the premises. In those circumstances, when should the matter be considered? I think, in the absence of any other guide in either Act, that here, as in (for example) rent restriction cases, the standard of reasonableness is left to the county court judge to determine upon all the facts as he finds them at the date when he hears the case.

At the date when the county court judge finally heard this case—indeed, on both dates—the length of the lease had become and was irrelevant. But it is clear to my mind that it was solely the fact that there were 31 years left and no more of this lease which caused the judge to conclude adversely to the corporation. In a long and careful judgment, he first considered the figures of income and outgoings and he showed that, given that the proprietor, the person having control, was the freeholder, there should be a profit of £50 a year, or a little less, shown in the foreseeable or immediately foreseeable future by excess of rents recoverable over the necessary expenditures, including a sum which he allocated towards repairs. He said, in effect, as I follow the judgment, that to spend £350 (which is what he found would have to be spent to comply with this notice) to produce that result would be a reasonable thing to do. But he then took the comparable figures on the basis that the interest of the person having control was merely a 31-year term. In that event, when allowance had been made for amortization and so forth, all the proprietor would get out of it would be, at best, £16 a year, which he held to be an unreasonable return, or a very meagre return, to use his own language; so as to lead him to the conclusion that the expenditure of this money would not be a reasonable thing for such a lessee to do in order to produce a fit state at the house.

That was not the only one of the special defences relied on by the proprietors. They also relied on the last special defence, (d), to the effect that the tenant, who was a man of the name of Kilburn, was the person who was responsible for the condition of the dwelling-house. As a fact, the judge rejected that suggestion, and found that Kilburn was not a person slovenly and otherwise mischievous in what he did to the premises. Special defence (d) therefore goes out of the picture. There remains only (c) (for (b), as I have already said, was not relied on)—expenditure incurred by the person having control of the house, etc., during the three preceding years. That was considered, and the facts were found to this effect, that during the first of these three years £4 15s. 0d. was spent on repairs, during the second of them £3 15s. 0d., but during the third £166 9s. 0d., and that, it is stated, was in compliance with a sanitary notice—though it seems to be in some doubt whether the whole or part of it was not contributed by the War Damage Commission.

The average for those three years is £58 6s. 4d. When the figures which I have already mentioned came to be considered, on what I call the business expectation of this property as a freehold and as a leasehold, the judge took that figure of £58 (or, rather, the round figure of £60). And, although he does not specify precisely his method of reasoning, I take it that he thought then: "That was what had to be spent during those three years. "There will now be £350 spent in getting the house what I may "call shipshape, and therefore I should think a fair allowance for "repairs for the immediately foreseeable future would be a "quarter of that average figure of £60, namely, £15," and he brought that figure into each calculation. He did not, however, (and it was not necessary for him to do so), separately consider the question of the expenditure incurred, that is to say, separately from the computations which turned on the hypothesis on which he proceeded to deal with the case, namely, that the Connaught company were lessees only; and it is said by Mr. Stephenson: "Assuming that he should have disregarded "the leasehold interest which the Connaught company held, or "considered it to be of no relevance, still I ought to be entitled "to argue that, on the basis of these repairs alone, it is not "reasonable that I should be called upon to do this work." If I thought that there was any possible ground on which, for that reason alone, such a conclusion might be reached, I should refer the matter back to the judge to allow him to determine it; but, reading his judgment as a whole and giving the matter my own best consideration, it seems to me quite impossible to say that that fact alone (namely, three times £58 having been spent on repairs during those three years) could be a determining factor in arriving at a conclusion in this case.

I therefore think, looking at the case as a whole, that the right answer and the just answer is that in this case the order made by the judge ought to be set aside—and I state the ground again, to make it quite clear—because at the relevant date, namely, when he heard the matter, the Connaught company was an absolute freehold owner; and accordingly that the order which was quashed of June 27, 1952, should resume its validity and effect.

Jenkins L.J. I agree and find nothing that I can usefully add.

Hodson L.J. I also agree and have nothing to add.

Appeal allowed.

Solicitors: *Sharpe, Pritchard & Co. for R. S. Forster, Kilburn; A. Rawlence.*

B. A. B.

C. C. A.

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Lord Goddard C.J., Byrne and Parker JJ.

REGINA *v.* PHILLIPS.

Criminal Law—Practice—Summary offence—Election to go for trial—Substitution of different offence—Conviction quashed—Vehicles (Excise) Act, 1949 (12, 13 *&* 14 *Geo.* 6, *c.* 89), *s.* 9 (1)*—Perjury Act,* 1911 (1 *&* 2 *Geo.* 5, *c.* 6), *s.* 5 (*b*)*—Summary Jurisdiction Act,* 1879 (42 *&* 43 *Vict. c.* 49), *s.* 17*—Administration of Justice (Miscellaneous Provisions) Act,* 1933 (23 *&* 24 *Geo.* 5, *c.* 36), *s.* 2 (2).

Where a defendant charged with a summary offence elects in pursuance of section 17 of the Summary Jurisdiction Act, 1879, to be tried by a jury and is committed for trial for that offence the prosecution ought not to proceed under section 2 (2) of the Administration of Justice (Miscellaneous Provisions) Act to include in the indictment charges for other offences, whether by way of addition to or in substitution for, the offence for which the defendant was committed for trial. Such a course has the effect of turning a defendant's right of election under section 17 into something in the nature of a trap.

Where, therefore, a defendant who was charged before justices with a summary offence under section 9 (1) of the Vehicles (Excise) Act, 1949, in relation to an application for a motor-car licence, and who elected to be tried by a jury and was committed to quarter sessions for trial for that offence, was at quarter sessions in relation to the same application indicted for and convicted of offences under the Perjury Act, 1911, the conviction was quashed.

APPEAL against conviction.

The appellant was charged before justices with having, when applying for a motor-car licence, unlawfully made a declaration, contrary to section 9 (1) of the Vehicles (Excise) Act, 1949,[1] that a certain motor-vehicle had not been previously registered. That was a summary offence for which a person was liable on conviction to a term of imprisonment not exceeding six months, and the appellant elected, under section 17 of the Summary Jurisdiction Act, 1879, to go for trial by a jury, and he was committed by the justices to quarter sessions for trial for that offence. When he appeared before quarter sessions, however, he was not charged with an offence under the Vehicles (Excise) Act, 1949, but on an indictment containing three counts charging him, in connexion with the application for the motor-car licence, with offences under section 5 (*b*) of the Perjury Act, 1911,[2] which carried severer penalties. The appellant was convicted on that indictment and sentenced to four months' imprisonment; he was also convicted of other offences on different indictments in respect of which he received sentences of imprisonment. The appellant applied to the court for, and was granted, leave to appeal against his convictions for perjury only.

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[1] Vehicles (Excise) Act, 1949, s. 9 (1): "Every person applying for a "licence under this Act shall make "such a declaration and furnish such "particulars with respect to the . . . "vehicle for which the licence is to "be taken out . . . as may be pre-"scribed; and if any person in con-"nexion with an application for such "a licence makes a declaration which "to his knowledge is false or in "any material respect misleading, he "shall be liable on summary convic-"tion to a penalty not exceeding fifty "pounds or to imprisonment for a "term not exceeding six months."

E. Daly Lewis for the Crown referred to *Rex* v. *Thomas*.[3] The counts in the indictment charging the appellant with perjury were founded on evidence disclosed in the depositions taken before the justices in relation to the charges under the Vehicles (Excise) Act, 1949; there was also evidence before the justices in relation to other charges upon which he could have been indicted for perjury. Had the charges under the Vehicles (Excise) Act, 1949, not been preferred the appellant could on the same evidence have been charged before the justices with perjury; it is submitted that by section 2 (2) of the Administration of Justice (Miscellaneous Provisions) Act, 1933,[4] the prosecution were entitled to charge him in the indictment with the offences under the Perjury Act, 1911.

The appellant was not represented.

LORD GODDARD C.J. The appellant was charged and convicted before the Buckinghamshire quarter sessions with a variety of offences relating to bankruptcy and certain other matters. He was also charged on an indictment alleging that he "in a "declaration made under section 9 (1) of the Vehicles (Excise)

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[2] Perjury Act, 1911, s. 5: "If "any person knowingly and wilfully "makes (otherwise than on oath) a "statement false in a material par-"ticular, and the statement is made ". . . (*b*) in a . . . declaration . . . "or other document which he is . . . "required to make . . . by any public "general Act of Parliament . . . he "shall be guilty of a misdemeanour "and shall be liable on conviction "thereof on indictment to imprison-"ment . . . for any term not exceed-"ing two years, or to a fine or to both "such imprisonment and fine."

[3] (1947) 32 Cr.App.R. 50.

[4] Administration of Justice (Miscellaneous Provisions) Act, 1933, s. 2: "(2) . . . no bill of indictment "charging any person with an indict-"able offence shall be preferred "unless . . . (*a*) the person charged "has been committed for trial for "the offence . . . Provided that— "(i) where the person charged has "been committed for trial, the bill "of indictment against him may "include, either in substitution for or "in addition to counts charging the "offence for which he was committed, "any counts founded on facts or "evidence disclosed in any . . . "deposition taken before a justice in "his presence, being counts which "may lawfully be joined in the same "indictment."

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" Act, 1949, in connexion with an application for a licence for a " Standard Vanguard motor car, wilfully made a statement false " in a material particular, namely, that the said motor-car had " not been previously registered." The statement of offence with regard to that charge was " making a false declaration, contrary " to section 5 (*b*) of the Perjury Act, 1911." The indictment contained other counts, one of which was for making a false declaration contrary to section 5 of the Perjury Act, 1911, which only alleged another false statement in a material respect.

The point which arises is of considerable importance, and since it may arise again it is as well that this court should say something for the guidance of other courts. There is no provision in section 9 (1) of the Vehicles (Excise) Act, 1949, or elsewhere in the Act, that a person shall be liable to a certain penalty on summary conviction and to a more severe penalty on conviction on indictment. If that were the case magistrates could make up their own minds whether they would send a defendant for trial or not, or the defendant could elect to go for trial.

The offence with which the appellant was charged before the justices is stated to be a summary offence but, as it carries with it a liability to imprisonment for more than three months the appellant had a right, under section 17 of the Summary Jurisdiction Act, 1879, to elect to go for trial. If he elected to go for trial, which he must do before the case was gone into, the justices had to send him for trial if there was a prima facie case.

In this case the appellant did elect to go for trial, and he was committed for trial in respect of the offence; he was also sent for trial for other offences, but that is another matter. With respect to this offence, when he reached quarter sessions he was not charged with the offence for which he had been sent for trial, but with an offence under section 5 (*b*) of the Perjury Act, 1911, which is a different offence, because it is under a different statute, from the offence with which he had been charged before the justices. That statute is no doubt wide enough to catch people who have made false declarations, and it may well be that the evidence to support the charge under the Perjury Act would be the same as the evidence to support the charge under the Vehicles (Excise) Act, 1949, and that, if the excise authorities had charged the appellant originally before the justices with an offence under the Perjury Act—though it is very unlikely that they would because of the express provision in section 9—the evidence which they would have had to lead would be the same as the evidence they would lead for a charge under section 9. Every practitioner in criminal law knows that section 2 (2) of the Administration of Justice (Miscellaneous Provisions) Act, 1933, which corresponds very closely to the provision in the old Vexatious Indictments Act, 1859, provides that although justices may have committed a defendant for a certain offence, if the evidence on the depositions shows that there is another offence disclosed which could be made the subject of a charge, a count charging that offence may be added, and therefore an indictment may contain a count for an offence for which there has not been a formal committal.

It is sought to say in this case that the depositions showed an offence under the Perjury Act, and that therefore the prosecution were entitled by reason of that provision to put forward charges under the Perjury Act although the appellant had been sent for trial charged with an offence under the Vehicles (Excise) Act. I will assume that that is right, but nevertheless this court cannot approve of such a course being taken because in reality it is turning the option that is given to a defendant by section 17 of the Summary Jurisdiction Act, 1879, into something in the nature of a trap. A person finds himself before the justices charged with an offence for which the maximum punishment is six months' imprisonment, elects to go for trial before a jury, and then finds that he is charged with a different offence, carrying heavier penalties, and one with which, had he been convicted before the justices, he could not subsequently have been charged. In this case, had the appellant not opted to go for trial, but been convicted by the justices, he could not afterwards have been prosecuted under section 5 of the Perjury Act.

This court cannot approve of the addition or substitution of another charge to or for the charge for which a prisoner was originally before the justices in any case where quarter sessions only obtain jurisdiction by reason of the prisoner having exercised his option under section 17. I think that that ought to be understood. It not infrequently happens that alleged offences under the Merchandise Marks Act, 1926, which come before the courts in the first instance as summary offences, very often go for trial because the defendants elect to go for trial or to have a verdict of a jury. In many cases there is a serious dispute as to what is a sardine or what is burgundy or what is whisky, and matters of that sort, and they go before a jury; but it would not be right for a defendant, because he has elected to stand his trial for a summary offence under the Merchandise Marks Act, to be suddenly faced with charges of false pretences which had never been preferred against him.

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For these reasons, the conviction on this indictment is quashed, and that means that the appellant will serve four months less.

Appeal allowed.

Solicitors: *Horwood & James, Aylesbury.*

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Mar. 24, 25, 26, 27, 30, 31.

Singleton, Denning and Romer L.JJ.

BARNARD AND OTHERS *v.* NATIONAL DOCK LABOUR BOARD AND OTHERS.

[1950 B. No. 2906.]

Statutory Tribunal—Control by courts—Declaration or injunction—Labour board—Unauthorized delegation by board of power to suspend workers from work and pay—Suspensions a nullity—Decisions of statutory appeal tribunal dismissing appeals against suspensions also null and void—Certiorari no remedy—Discretionary power of court to intervene by way of declaration and injunction to remedy injustice—Dock Workers (Regulation of Employment) Order, 1947 (*S.R. & O.* 1947, *No.* 1189).

By the Dock Workers (Regulation of Employment) Order, 1947, the first defendants, the National Dock Labour Board, were required to delegate to local boards, composed of equal numbers of representatives of workers and employers, all appropriate functions, including under clauses 15 and 16 of the order the operation of a disciplinary code. The London Dock Labour Board—a local board—purported to delegate those disciplinary functions to the port manager. In the events which happened, the port manager suspended the plaintiffs, registered dock workers, from work and pay. The plaintiffs appealed to the appeal tribunal set up under the order, but their appeals were dismissed. The appeal tribunal had no power to impose but only to revise penalties imposed by the local board.

The plaintiffs thereupon started proceedings against the first defendants and the second defendants (the employers), claiming declarations that they had been wrongfully suspended. On discovery of certain documents by the first defendants shortly before the trial of the action, the plaintiffs learned for the first time that they had been suspended, not by the local board, but by the port manager, and they accordingly amended their pleadings and claimed a further declaration that the original notices of suspension were ultra vires and invalid.

Before McNair J. the National Dock Labour Board raised as a preliminary point the plea that the decisions of the statutory appeal tribunal disallowing the plaintiffs' appeals could be set aside only by an order of certiorari, and that the court had no jurisdiction to inquire by way of an action for a declaration into the matters complained of. McNair J. held that the court had such jurisdiction; but on the substance of the action he gave judgment for both defendants, holding for the first defendants that the local board had power to delegate its disciplinary functions to the port manager. On appeal by the plaintiffs, and cross-appeal by the first defendants:—

Held, first, reversing McNair J., that the local board had no power, express or implied, to delegate its quasi-judicial disciplinary functions to the port manager or to ratify his purported exercise of those functions, and the original notices of suspension were therefore a nullity, and the decisions of the appeal tribunal based on them were equally a nullity:

Held, secondly, affirming McNair J. and dismissing the cross-appeal, that in proper cases where persons would otherwise be without a remedy for an injustice, the court had a discretionary power to intervene by way of declaration and injunction in the decisions of statutory tribunals.

Andrews v. *Mitchell* [1905] A.C. 78 and *Cooper* v. *Wilson* [1937] 2 K.B. 309; 53 T.L.R. 623; [1937] 2 All E.R. 726 followed.

Decision of McNair J. [1952] W.N. 392; [1952] 2 T.L.R. 309; [1952] 2 All E.R. 424 reversed in part and affirmed in part.

APPEAL and CROSS-APPEAL from McNair J.

By the Dock Labour Scheme for the Port of London, made pursuant to the Essential Work (Dock Labour) Order, 1941, which regulated conditions of work for dock workers in certain ports of the United Kingdom during wartime, the local dock labour board in the Port of London was expressly empowered to entrust to its port manager, a paid official of the existing dock authority, certain matters of disciplinary procedure, and in particular, under clause 18 (*e*) of the scheme, the port manager might suspend a workman without pay from the dock labour scheme.

At the conclusion of hostilities a new scheme was substituted for the old, by the Dock Workers (Regulation of Employment) Order, 1947 (S.R. & O. 1947, No. 1189), made pursuant to the Dock Workers (Regulation of Employment) Act, 1946, the objects being to ensure greater regularity of employment for dock workers and to secure that an adequate number of dock workers was available for the efficient performance of dock work. A National Dock Labour Board was set up to be responsible for the administration of the scheme, and by clause 3 (3) was given the duty of delegating appropriate functions to local boards which, by clause 5 (1), were to be set up in each port. By clause 5 (2): " The

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"local board shall consist of equal numbers of persons representing dock workers in the port and of persons representing the employers of such dock workers. The local board shall appoint a chairman and deputy-chairman, but every such appointment shall be subject to the subsequent approval of the National Board."

Provision was also made for the payment of salaries, fees, and allowances to members of the local board. Under sub-clause (7) of clause 5, the local board was empowered to set up appeal tribunals for the purpose of appeals under the scheme, to consist of persons, "not being members of the local board"; and by sub-clause (9), "the procedure and quorum of a local board shall be such as the board may from time to time determine." By clause 15 (which has the marginal note "Disentitlement to payment."): "(1) A registered dock worker available for work who while in the reserve pool fails without adequate cause to comply with any of the provisions of clause 8 (4) (*a*) hereof, shall not be entitled to receive any payment under clause 14 hereof in respect of any pay week in which such failure occurred or continues. . . . (3): A registered dock worker available for work who while in employment to which he has been allocated by the local board fails without adequate cause to comply with the provisions of clause 8 (5) hereof, or fails to comply with any lawful orders given to him by his employer, may have his engagement terminated and may be returned to the reserve pool, and, whether or not he is so returned, may be reported in writing to the local board. . . . (4): The local board shall consider any written report received under paragraphs (2) or (3) hereof, and if, after investigating the matter, the board notifies the registered dock worker that it is satisfied that there has been such failure or behaviour as aforesaid, the registered dock worker shall not be entitled to any payment, or to such part of any payment as the board thinks fit, under clause 14 hereof in respect of the pay week in which such failure or behaviour occurred or continues."

Clause 16, the marginal note to which is "Disciplinary procedure," provides: "(2) Where a registered dock worker available for work fails to comply with any of the provisions of the scheme, then without prejudice to and in addition to the powers conferred by clause 15 hereof, the local board may take any of the following steps as regards that dock worker—it may (*a*) determine that for such period as it thinks proper he

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"shall not be entitled to any payment under clause 14 hereof; "(*b*) suspend him without pay for a period not exceeding seven "days; (*c*) give him seven days' notice of termination of employ-"ment; (*d*) dismiss him summarily."

By clause 18 provision was made whereby a registered dock worker who was aggrieved for any of various specified reasons could lodge an appeal in writing with the appeal tribunal, which was required to hear the appeal as soon as might be; and under sub-clause (2) it was provided that "in all cases the tribunal "shall have power to vary, modify or alter the penalty imposed "so, however, that it shall not have power to increase any penalty "imposed or to impose a more severe penalty." ✓

Shortly after the introduction of the scheme of 1947, meetings of the relevant local dock labour board, the London Dock Labour Board, were held in accordance with the requirements of the scheme from time to time. The minutes of those meetings, of which discovery was made by the first defendants, the National Dock Labour Board, shortly before the hearing of the action before McNair J. in July, 1952, showed that between July, 1947, and November, 1948, members of the local board, and in particular the trade union and Port of London Authority representatives, drew attention on many occasions to the desirability of placing disciplinary matters in the hands of the board, as required by the scheme, and various practical methods of doing so were canvassed. In particular, there was considerable discussion as to the undesirability of continuing the wartime practice whereby disciplinary matters were left in the hands of the port manager. Despite those discussions, however, the wartime practice was maintained whereby the London port manager, Mr. Hogger, continued to carry out disciplinary measures, and at a meeting on October 2, 1947, a resolution was passed by the board which had the effect of leaving the power to impose punishments on dock workers under clause 16 (2) (*a*) (*b*) and (*c*) in the hands of the port manager, though he was required to make reports to the board each week. It was agreed, however, that the power to impose the punishment of summary dismissal, under clause 16 (2) (*d*), was not to be in the control of any official without the permission of the board. The evidence showed that weekly reports were not in fact made to the board, though reports were made from time to time. That procedure in relation to disciplinary measures, which in effect continued the wartime practice authorized by the order of 1941, was followed in the Port of London until judgment was given in the Court of Appeal in the present appeal on March 31, 1953.

The facts giving rise to the claim of substance in the action were as follows: The plaintiffs in the original action were 14 journeymen lightermen, members of the Watermen, Lightermen, Tugmen and Bargemen's Union, and registered dock workers under the Dock Workers (Regulation of Employment) Order, 1947. At all material times they were in the employment under the scheme both of the first defendants, the National Dock Labour Board, and of the second defendants, Silvertown Services Ld., a firm of master lightermen engaged in lighterage work for Tate & Lyle Ld., the principal importers of raw sugar, in the Port of London. For many years before 1950, raw sugar had been brought into the port in bags, lighterage services being provided by about 100 licensed lightermen, including the plaintiffs. The lightermen had a long-standing custom by which they worked from 8 a.m. to 5 p.m. on weekdays and from 8 a.m. to noon on Saturdays. They also had a practice whereby the craft for unloading a particular ship were marshalled continuously by the same group of lightermen, known as the " ship's hands " method; and this latter practice was upheld in a ruling given in regard to the working of the *S.S. Cape Hawke* in 1948.

In 1950, however, the sugar importers decided to try out a new method of importing raw sugar in the ship's hold in bulk, to be unloaded by means of grabs at a coal wharf, this method being quicker and ensuring a speedier turn-round of ships. The men on shore at the coal wharfs worked two shifts, from 6 a.m. to 2 p.m. and from 2 p.m. to 10 p.m., and the sugar importers therefore wanted the lightermen to fit in their hours of work with those shifts. The lightermen wished to retain their customary practices of working from 8 a.m. to 5 p.m. by the " ship's hands " method, contending that as their work with their craft remained the same whatever the system of unloading sugar adopted, there was no reason why they should be required to alter their established custom and practice. Their trade union recommended them to do as they were asked, but they declined to do so. Eventually, the second defendants put the matter to the test; on Friday, April 14, 1950, they gave the lightermen orders to load their craft from 2 p.m. to 10 p.m.; and on Saturday, April 15, they gave other lightermen orders to load their craft until 2 p.m.

The plaintiffs refused to carry out those orders, and the second defendants thereupon reported them in writing to the

London Dock Labour Board for disciplinary action under the scheme. On Wednesday, April 19, 1950, the clerk of the board sent to each of the men a notice of the charge against him, namely, refusal to obey orders to attend and load craft at the S.S. *Baron Renfrew*, and requiring them to send their explanations to their sector office "within the next three days." The men sent their explanations by post late on the Friday night, and though these were not received at the board's offices until Monday, April 24, they were sent in time. Meanwhile, on Saturday, April 22, before the explanations had been received or the time for receiving them had run, the port manager sent out to each of the men concerned notices of suspension, on roneoed forms headed "National Dock Labour Board," informing them that under clause 16 (2) (*b*) of the scheme they would be suspended without pay for a period of seven days, and also informing them of their right to appeal against the decision. The men promptly gave notice of appeal, taking both the point of procedure, namely, that they had been suspended before the time for submitting explanations had run, and also the point of substance, namely, that in their view the orders of the employers were contrary to their terms of employment. Meanwhile, on April 19, the port manager made his report to the local board, and the document had a note appended "No replies to complaint "form received." That, as the facts above set out show, was not correct.

The appeals were heard by the appeal tribunal on May 9, 1950, and were dismissed. The tribunal ordered that the period of suspension should operate from dates stated. Thereupon the plaintiffs and 91 of their colleagues employed by the second defendants ceased work for the duration of the period of suspension. The first defendants dismissed them; and there ensued a severe stoppage of work in the docks until, on June 6, 1950, the writ in the action was issued by the plaintiffs to test the legality of their suspension; and the men returned to work.

By their statement of claim, the plaintiffs claimed, inter alia, declarations that the orders given by their employers on April 14 and 15 were unlawful; that the purported investigation by the first defendants of the reports made by the employers was not carried out in a lawful manner; that the suspension of the plaintiffs for one week from the scheme of 1947 was unlawful; and that each of the plaintiffs was entitled to one week's wages in respect of the period of their suspension.

Shortly before the hearing of the action, in July, 1952, there was discovery of documents by the first defendants, including the minutes containing the record of the resolutions referred to above, from which documents the plaintiffs learned for the first time that their suspension from work and pay had been carried out, not by the local board, but by the port manager, and their pleadings were amended as follows: "Further, that the pretended suspension was illegal, ultra vires, and invalid, as it "was made by the London port manager, and not by the local "board as required by the scheme, clauses 15 and 16."

Before McNair J. the first defendants raised as a preliminary point a plea to the jurisdiction, namely, that as the appeal tribunal, a statutory body, had dismissed the appeals and confirmed the suspension of the plaintiffs, those decisions were binding on all persons, and unless and until they were set aside by an order of certiorari, the court had no jurisdiction to inquire into any of the matters set out in the plaintiffs' reamended statement of claim.

McNair J. gave judgment for the plaintiffs on the preliminary point on July 7, 1952,[1] and held on the authorities that in the case of statutory bodies exercising a judicial or quasi-judicial function, there might be a remedy both by certiorari and by way of declaration or injunction.

On the substantial matters, McNair J. gave judgment for both defendants on October 3, 1952. After finding that the method of unloading raw sugar in bulk by grabs was an entirely new traffic, he held that the orders of the second defendants were lawful. On the question raised in the reamended statement of claim as to the power of the London Dock Labour Board to delegate its duties in regard to disciplinary procedure to the port manager, he held that there was nothing in the express provisions of the scheme which required the board to meet to consider and determine on each suspension order, and expressed the opinion that the board had acted well within its powers when by resolution it had authorized the port manager as its agent to determine whether or not suspension notices should be sent out.

The plaintiffs appealed, seeking to challenge the decision of McNair J. that the orders of the second defendants were lawful. After three days of hearing, however, when it became clear that this was a question of fact which had been decided in favour of

[1] [1952] W.N. 392; [1952] 2 T.L.R. 309; [1952] 2 All E.R. 424.

the second defendants by McNair J., the plaintiffs no longer persisted in that, and their appeal against the decision in favour of the second defendants was dismissed. The appeal proceeded against the first defendants, who by a cross-appeal on a plea to the jurisdiction challenged the decision of McNair J. as to the power of the court to grant a declaration in the circumstances of the case.

The plea to the jurisdiction was raised as a preliminary point on the appeal, but the court decided to hear the appeal first.

Gilbert Paull Q.C. and *Harold Brown* for the National Dock Labour Board. It is submitted that as there has been a decision of the appeal tribunal, a semi-judicial statutory body, it is not open to the court to try the issue raised, namely, that the decision is invalid, by way of an action for a declaration, but only by proceedings for a writ of certiorari.

[SINGLETON L.J. The court wishes to hear the appeal before considering that preliminary point.]

John Platts-Mills for the plaintiffs. It is submitted (1) that the orders given by the employers, the second defendants, to the plaintiffs were outside the terms of the domestic contract between them although admittedly within the general framework of the port's working rules; (2) even if the orders were lawful, the board in suspending the plaintiffs adopted an incorrect procedure, because the Dock Workers (Regulation of Employment) Order, 1947, entrusts the exercise of discipline, previously administered by the port manager, to the local board itself. But that board simply carried on the old procedure, purporting to delegate its authority to the port manager, who, purporting to act in his own right, signed the suspension notices. Moreover, he failed to carry out the statutory requirements under clause 15 (4) of investigation into their complaints; he merely conferred with the employers, sent out the notices requiring the plaintiffs to send in their explanations within three days, and suspended them on the second day. If the plaintiffs can establish that the employers' orders were wrongful, or that the departures from the scheme were unlawful, both defendants are liable. McNair J. said that this tribunal did not have a judicial function to perform.

Under clause 18 (2) the appeal tribunal has power to vary the effect of the original suspension but not to impose a new suspension. The notice was a nullity, and the men appealed against a nullity, though they could not know that at the time. McNair J.

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said that *Huth* v. *Clarke* [2] and *Local Government Board* v. *Arlidge* [3] were authority for showing that a body such as this could delegate its duties to a manager; but in those cases there was express power of delegation.

[DENNING L.J. Those cases do not assist on what is surely a question of construction of the scheme and whether there is power to delegate or not.]

The local board has delegated powers only and cannot delegate without express power to do so. It is appointed by statute to preside over the whole working of the port; its disciplinary functions required the exercise of a serious discretion and were therefore quasi-judicial.

There is no complaint that the appeal tribunal did not hear the plaintiffs; but it was given inaccurate information, and neither the tribunal nor the plaintiffs had any chance of finding out the truth until discovery of the board's minutes in the course of the action showed that the suspension was the act of the port manager and not of the board.

[*Platts-Mills* then made his submissions on the appeal against the decision in favour of the second defendants; but on the fourth day of the hearing he intimated that in view of the findings of fact by McNair J. the plaintiffs would not persist in that part of the appeal; and the appeal against the second defendants was accordingly dismissed.]

Gilbert Paull Q.C. and *Harold Brown* for the board. It is submitted (1) that the court of first instance had no jurisdiction to go into the matters alleged in this action; (2) if there was jurisdiction, no grounds were disclosed in the evidence on which the appeal tribunal's decision can be reversed; (3) unless that decision can be reversed, there is not only the provision of clause 19 of the Order that the notice of suspension "shall be "treated as effective" if the appeal is disallowed, but also the decision of the tribunal, suspending the plaintiffs from the dates set out therein, which must stand. That was a decision neither of the board nor of the port manager, but of a tribunal to which the legislature has given power to determine all questions of law and fact.

If I am right on that, the following arguments on delegation and ratification are irrelevant. But, if I am not right, it is submitted that (a) the local board could delegate its power of suspension; (b) even if it could not delegate, the board later ratified the act of the port manager; and (c) the plaintiffs by their appeal have waived any complaint against the original suspension.

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[2] (1890) 25 Q.B.D. 391.

[3] [1915] A.C. 120; 30 T.L.R. 672.

If there is no power to delegate, the whole scheme falls to pieces, for it is impossible in practice for the board to administer it without delegation. The scheme is practical politics drafted with knowledge of the river. It was not intended that the busy men who serve on the board should sit day after day to consider problems which arise 20,000 times a year.

[SINGLETON L.J. If you develop that argument, you must show why there was a change from the wartime practice under which one man dealt with all these matters to a new practice whereunder a board consisting of equal numbers of representative persons was substituted.]

[ROMER L.J. The evidence shows that it takes the port manager two days a week. It would take less if the board increased its numbers. It has power to fix its own quorum.]

The scheme is administrative and falls within the principle stated by Lord Haldane in *Local Government Board* v. *Arlidge*,[4] where it was held that power could be delegated to one employee; see also Wills J. in *Huth* v. *Clarke*[5] on the scope of delegating authority.

[SINGLETON L.J. Before Lord Haldane's observations on the position of an administrative body can be applied we must conclude by looking at the scheme itself that this is an administrative tribunal. If a scheme is drawn up by a Minister on advice from all sides, and the board which is entrusted with disciplinary control can simply tell the port manager to decide all questions of discipline, that ought to be part of the scheme so that the men and the employers may know what is intended; otherwise the men may feel a sense of injustice.]

[DENNING L.J. If a man is to be suspended for alleged misconduct, I should have thought that was a judicial function. Again, by clause 3 (3), the National Board delegates some of its functions to the local board, and it is a principle of law that a delegate cannot himself delegate. If there is power to delegate one would expect it to be express.]

Even if there is no power to delegate, the board may ratify the suspension orders and adopt them as its own acts: see *per* Parke B. in *Buron* v. *Denman*.[6]

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[4] [1915] A.C. 120, 133.

[5] 25 Q.B.D. 391, 395.

[6] (1848) 2 Ex. 167, 188.

[DENNING L.J. The general principle of ratification is that it is equal to a prior command. But if a prior command has no effect because the board cannot delegate, then ratification has no effect.]

The authorities show that one can ratify afterwards. There is nothing in law which limits the time in which an act may be ratified: see *Firth* v. *Staines*,[7] where ratification did not take place until after the information had been laid.

[SINGLETON L.J. Was there anything in the nature of ratification before the appeal?]

By the board, No.

[SINGLETON L.J. So the appeal was against an order of the board at a time when the board qua board knew nothing of the act of the port manager; and the tribunal dismissed an appeal against something of which the board knew nothing. It must be part of your case that there was ratification which could make the order good.]

The nature of the board's function within the scheme is administrative until a matter reaches the appeal tribunal, which is the judicial body. The local and national boards are assimilated to the position of an employer at common law having to consider whether or not to dismiss an employee, or the board of directors of a company delegating its powers of dismissal to its agent.

[ROMER L.J. Your arguments on delegation and ratification rest on the view of the board's functions under clauses 15 and 16 as being purely administrative? Would you still so argue if you regarded them as having a judicial element?]

I could only argue ratification of the notice. One cannot ratify a judicial act.

The real legal importance, however, arises on the main argument, as to whether the action lies. If there is jurisdiction in the court to go into these matters with a roving commission by an action for a declaration whenever a man says that an order should not have been given, discipline will become impossible. The appeal tribunal was set up by Parliament to consider any case where a worker was "aggrieved" by a notice. The word "aggrieved" is a wide word and might mean many things and cover every possible combination of circumstances in which he might say: "This notice should be set aside." Parliament has made the tribunal the sole judge of fact and law, so that it never lay in the mouth of anyone to come here and say: "They did

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[7] [1897] 2 Q.B. 70.

"not consider this fact" or: "They were wrong in law." The suspension is lawful because the tribunal ordered it. It was for the tribunal to consider whether or not the notice was effective. If they disallowed the appeal, Parliament by clause 19 has said that the notice "shall be treated as effective." It does not matter if there are 50 defects in it. That is the legislature's method of preventing disputes going on and on.

[DENNING L.J. Is there not a distinction between an irregularity in a notice and a notice which is in law a nullity?]

That may be; but the tribunal gave a decision which stands as a good and final order by a court of competent jurisdiction, unless it is quashed by certiorari.

[SINGLETON L.J. If the original suspension was a nullity, and an appeal against a nullity is disallowed, what is left?]

The order of the tribunal.

[SINGLETON L.J. But all that that does is to alter the dates in the original notice. It would be a matter for regret if, after days of hearing, this court were unable to help the parties as to the true position on the power to delegate. It is important that the men should know their rights. One might have hoped that the National Board would welcome the views of the court on this point.]

It welcomes the views of the court, but does not want to be faced with thousands of actions. The board does not say that if its procedure is wrong it will continue in that wrong procedure. The question is whether the action for a declaration lies. If it does, it lies for everyone, e.g., against a rate collector for an assessment which the ratepayer contends is founded on a decision which ought not to stand. It is only by examining the authorities that one can see the scope of the action: see *Cooper* v. *Wilson*,[8] where Greer L.J. said that in the particular circumstances the statutory tribunal was not properly exercising any function at all, so that the court could step in and make a declaration: see MacNaghten J.[9] dissenting, who said that the court could not interfere. The judgment of the court is nothing more than a finding that where there is no jurisdiction the court can interfere.

[SINGLETON L.J. The argument of Mr. Wooll Q.C.[10] that neither mandamus nor certiorari would be of any use was accepted by the court.]

[ROMER L.J. The real gist of *Cooper* v. *Wilson* is in the judgment of Greer L.J.[11] that the claim for a declaration does lie. It cannot matter what the want of jurisdiction is.]

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[8] [1937] 2 K.B. 309, 320–1; 53 T.L.R. 623; [1937] 2 All E.R. 726.

[9] [1937] 2 K.B. 309, 358.

[10] Ibid. 313.

If there is a complete lack of jurisdiction, the court may grant a declaration. But here the only question on jurisdiction is: "Were the plaintiffs 'aggrieved' persons?" within clause 18. This is a statutory tribunal and not an arbitration at common law, as was the case in *Lee* v. *Showmen's Guild of Great Britain*.[12] A statutory tribunal is given power in general terms, and the authorities show that those include power to decide fact and law. This tribunal had jurisdiction to decide the very point now before this court, as to whether or not there was power to delegate. The legal crux is whether, if they had decided that there was such power, their decision could have been attacked in an action for a declaration as well as by certiorari. If they had jurisdiction, it is submitted that their decision is final.

[Singleton L.J. If you are right there might as well be no courts. This form of action is much more convenient than certiorari to bring out all the facts.]

But if I am right, the court has no right to be told all the facts. The court's mind ought to be blank and, if the present point had been taken first, the court could have looked only at the pleadings and the scheme, and the question of power to delegate could not have arisen.

[Romer L.J. If it were a question of fact, the appeal tribunal's decision would be an end of the matter. But I would require clear language to show that Parliament intended the tribunal to be the supreme arbiter on what is a pure point of law as to the conduct of the board on a proper construction of the scheme.]

The tribunal is given exclusive power on a point of law, and if it is wrong in law the courts cannot intervene, unless the error is on the face of the documents, as in *Rex* v. *Northumberland Compensation Appeal Tribunal; Ex parte Shaw*,[13] when certiorari will lie and the court can look at the record.

[Denning L.J. This tribunal could not give itself jurisdiction by deciding a point of law wrongly! When certiorari grew up, there was no power at common law to give declarations and injunctions. The problem only arises now that the court has that power. It may be that the two remedies run side by side.]

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[11] Ibid. 324–5.

[12] [1952] 2 Q.B. 329; [1952] 1 T.L.R. 1115; [1952] 1 All E.R. 1175.

[13] [1952] 1 K.B. 338; [1952] 1 T.L.R. 161; [1952] 1 All E.R. 122.

It is submitted that they do not: see Romer L.J. in *In re Birkenhead Corporation; Quigley* v. *Birkenhead Corporation*[14]; *Osgood* v. *Nelson*[15]; *Spackman* v. *Plumstead Board of Works*[16]; *Allinson* v. *General Council of Medical Education and Registration*.[17] The principle is clear: once it is established that the legislature has given the tribunal powers on law and fact and no right of appeal from the tribunal, the matter is res judicata.

[DENNING L.J. On res judicata see the speech of Lord Davey in *Toronto Railway Co.* v. *Corporation of the City of Toronto*[18] that where an assessment was ab initio a nullity the court had no jurisdiction to confirm it or give it validity.]

See Lord Cairns L.C. in *Overseers of the Poor of Walsall* v. *London and North Western Railway Co.*[19] on the general jurisdiction of the Queen's Bench Division to reconsider orders made by inferior courts. It is not a jurisdiction to substitute a different order for the order of the tribunal. The House of Lords has been careful to point out that there is only one way of considering and quashing decisions of statutory tribunals.

[DENNING L.J. You should look at the modern cases, for a declaration, which is an equitable remedy, is a modern remedy.]

There are many decisions by such tribunals, e.g., rent tribunals, and there is no relief from them merely because there has been an injustice.

[SINGLETON L.J. Here there was a decision, and an appeal. On the second day of the hearing of this action someone discovered that the procedure had not been in accordance with the scheme. That is a point which has never been before any tribunal nor ever considered. I cannot see why this court should not say that the procedure was unlawful and grant a declaration. If it is the only way of putting right a wrong ought we to refuse the relief which may help to solve a difficulty which may otherwise run on for years?]

The board will be content if the court gives a judgment making it clear that there is no power of delegation, but must resist a judgment that there is a right to bring an action for a declaration with regard to an action of the board, when there is jurisdiction in the tribunal: see Denning L.J. in the *Northumberland* case[20];

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[14] [1952] Ch. 359; [1952] 1 T.L.R. 320; [1952] 1 All E.R. 262.

[15] (1872) L.R. 5 H.L. 636.

[16] (1885) 10 App.Cas. 229.

[17] [1894] 1 Q.B. 750.

[18] [1904] A.C. 809, 815.

[19] (1878) 4 App.Cas. 30, 38–9.

[20] [1952] 1 K.B. 338, 346.

Lord Esher M.R. in *The Queen* v. *Commissioners for Special Purposes of the Income Tax*[21]; *Rex* v. *Hampstead and St. Pancras Rent Tribunal; Ex parte Goodman.*[22] If the delegation was a nullity it may be that there was no jurisdiction. But if the question of delegation was arguable, Parliament has given the tribunal power to decide the question finally.

Platts-Mills in reply. There are three entirely separate streams of jurisdiction: (1) the prerogative writs; (2) inherent and statutory jurisdiction; (3) general jurisdiction of the courts by way of declaration and injunction to see that men's rights are preserved. Certiorari is a possible but not an exclusive remedy, and in some cases the injured party may take his choice: see *Rex* v. *Nat Bell Liquors Ld.*[23]

[SINGLETON L.J. Can both run at the same time?]

No. The court's discretion would make sure that only the appropriate proceedings were taken. The general jurisdiction must be sparingly exercised, and there are many circumstances in which the decisions of a tribunal could not be corrected. But in all the General Medical Council cases, where the tribunals were statutory tribunals, the remedy sought was by declaration, and never till this case has it been argued that there was no such remedy or that the court had no right to go into the merits: see *Leeson* v. *General Council of Medical Education and Registration*[24] and *Allinson* v. *General Council of Medical Education and Registration.*[25] McNair J. relied on those cases.

The two remedies may overlap. But where some unauthorized person has purported to make a decision and that decision has been acted on, then certiorari would not lie, and the only appropriate remedy may be by declaration: see *Cooper* v. *Wilson*[26]; and *Andrews* v. *Mitchell,*[27] on which I rely as a decision of the House of Lords which is on all fours with the present case on facts and law.

W. K. Carter Q.C. and *Geoffrey Lane* for Silvertown Services Ld.

SINGLETON L.J. read the statement of claim and the relevant clauses of the Order of 1947, and, having stated the facts, continued:—The first question is whether the local board had power to delegate their duties under clauses 15 and 16 of the order. The order does not give any such power expressly. Clause 15 is concerned with the question of payment; clause 16 is entitled "Disciplinary procedure." If the local board could delegate one of their powers they could delegate all. They do not say that they delegated all, but only some of them, and the delegation is said to have been in the minutes of the meetings of July 3, 1947, October 2, 1947, and November 29, 1948. The minutes show that the first at least, and, I think, the second, was a decision to carry on in the same way as they had done under the old order, but I am prepared to assume that it was intended as a delegation of their duties under the order of 1947.

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[21] (1888) 21 Q.B.D. 313, 319.

[22] [1951] 1 K.B. 541; [1951] 1 T.L.R. 37; [1951] 1 All E.R. 170.

[23] [1922] 2 A.C. 128; 38 T.L.R. 541.

[24] (1890) 43 Ch.D. 366.

[25] [1894] 1 Q.B. 750.

[26] [1937] 2 K.B. 309.

[27] [1905] A.C. 78.

McNair J.'s decision on this was in favour of the defendants. He said: "The next objection taken by the plaintiffs is that the "suspension order was made by the port manager and not by the "board. In my judgment there is nothing in the express pro-"visions of the scheme that requires the board itself to meet to "consider and come to a determination upon each suspension "order. In practice it would clearly be impossible for them to "do so in view of their constitution and in view of the fact "deposed to by Mr. Hogger that in any one year there may be "some 2,000 man-cases to consider. In my judgment the board "acted well within their powers when by resolutions dated "October 2, 1947, and November 29, 1948, they authorized "Mr. Hogger as their agent to determine (subject to report to "the board from time to time) whether or not suspension notices "should be sent. If authority be needed for these conclusions, "it can be found in *Huth* v. *Clarke*,[1] *Local Government Board* "v. *Arlidge*,[2] and other cases to the same effect cited on behalf "of the dock labour board. I would desire to reserve the question "whether, if contrary to my judgment, the board had no power "to delegate their functions to the port manager, any subsequent "ratification of his act would be of any avail."

It is, to my mind, essential to notice the change which was made by the order of 1947 by which the local board is entrusted with the disciplinary powers set out in clause 16 (2). ✓ Those powers are of a judicial, or certainly of a quasi-judicial nature. The constitution of the local board is laid down in clause 5 (2). It is to consist of equal numbers of persons representing the dock workers and persons representing employers, and by clause 5 (6) provision is made for payment to them of such salaries, fees and allowances as the National Board may determine. It is no answer to say there would have been too much work for them to do; nor do I think that any such case is made on the evidence of the port manager. In view of the scheme, or the order, as a whole, I fail to see that the local board had any power to delegate their disciplinary duties under clause 16, and I do not think that the authorities referred to in the judgment of McNair J. support the submission made on behalf of the defendants that the local board had power to delegate the duties given by clause 16 (2). It follows that the port manager had no right to suspend the men, or to issue suspension notices; there was no order of the local board. During the hearing of the appeal I asked where was the order of the local board, and I was referred to the document of April 24, 1950, headed "Notice of Suspension." It is not an order of the local board; it is a notice issued by the port manager. I cannot regard it as other than a nullity. The plaintiffs appealed against that suspension, and their appeals were disallowed. It is not necessary to dwell on the irregularities, such as the failure to wait until the time for the plaintiffs' explanations had run, or the note that no explanations had been received.

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[1] (1890) 25 Q.B.D. 391.

[2] [1915] A.C. 120.

It is said on behalf of the first defendants, the National Board, that as the plaintiffs appealed and failed, they cannot now be heard to say that their suspension was wrongful. If, as I think, the notice of suspension was in each case a nullity, the fact that there was an unsuccessful appeal on it cannot turn that which was a nullity into an effective suspension; nor can the words at the end of clause 19 have any such effect. The words to which I refer are "but otherwise the notice shall be treated as "effective." Clause 19 presupposes a good notice of suspension given on a decision of the local board under clause 16, and the notice which was given does not fall within that category. I do not think that the appeals of the plaintiffs can be said to amount to ratification or to waiver. That was the view of McNair J. who said: "On these findings it is also not necessary for me to "express any final opinion on the question of waiver raised by "the National Dock Labour Board. But had it been necessary "I should, as at present advised, have inclined to the view that "waiver was not established inasmuch as it was not proved that "the plaintiffs had the requisite knowledge in fact as to the port "manager's position or authority." It is clear that the plaintiffs had no knowledge of the position at the time of the appeal; discovery of the minutes was given at a late stage, and when the judge was considering the preliminary point an application to amend the statement of claim was made; that was granted, and I have read the amendment which was made.

Thus I come to the last point which was raised as a preliminary point on the trial. It is that the action does not lie. Mr. Paull told this court when the appeal was called on that there was a preliminary point; we thought we ought to hear the appeal first, and we reserved consideration of the preliminary point.

It is submitted on behalf of the National Dock Labour Board that in the order of 1947 there is a complete code on matters of discipline, and that the only way in which decisions can be questioned is by writ of certiorari. There is great force in this submission, and there is a body of authority to support it. It cannot be right to say that whenever a tribunal such as the local board or the appeal tribunal makes a mistake the court can grant a declaration such as is asked for in the present case; that would lead to endless confusion. The courts have, however, power to grant a declaration or an injunction in certain cases to prevent an injustice. In *Cooper* v. *Wilson*,[3] this court granted relief to a police officer who had been dismissed by the watch committee of the Liverpool City Council. In that case a question of jurisdiction arose. The appellant said that he had resigned from the police force, and that he was dismissed afterwards, so that he was entitled to the rateable deduction which had been made from his pay. He brought an action against the chief constable and the watch committee, claiming a declaration that he had duly resigned and was therefore entitled to be paid the rateable deduction which had been made from his pay. It was held (Macnaghten J. dissenting)[3]: "(1) That in a borough the "right to dismiss a police constable is vested solely in the watch "committee, but that in this case that committee had no power "to dismiss the appellant, who had already terminated his service "by due notice of resignation, and it had no power ex post facto "to treat him as dismissed as from a date prior to the hearing by "them of an application to confirm the purported dismissal by "the chief constable; (2) that it could not be said that by appearing before the watch committee the appellant must be taken to "have abandoned his notice of resignation; (3) that the appellant "was not limited to the right of appeal to the Secretary of State "given by the Police Appeals Act, 1927; and therefore (4) that

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[3] [1937] 2 K.B. 309.

"he was entitled to the declarations claimed. *Semble*, that the "proceedings before the watch committee were contrary to "natural justice owing to the presence of the chief constable "during the committee's deliberations on the appellant's "appeal," and the headnote of the case concludes: "Where a "statutory body is alleged to have acted without jurisdiction its "decision can properly be questioned in an action for a declaration that the decision is null and void."

Mr. Paull submitted that when the leading judgment, that of Greer L.J.,[4] is examined it becomes clear that in that case a body had acted without jurisdiction, and in such circumstances the court may have power to grant a declaration, as it did in that particular case. Greer L.J. said[5]: "It seems to me clear "that the watch committee have no power to dismiss a constable "who has already terminated his service by due notice, nor can "they ex post facto decide that they would treat him as dismissed as from a date prior to the hearing of an application to "confirm the decision of the chief constable"; and later he said[6]: "It would be idle for a plaintiff who is alleging that he "has never been dismissed to appeal to the Secretary of State, "nor do I think that the fact that that is a remedy which he "could take prohibits his access to the court for a declaration "that his dismissal was invalid, nor do I think that the power "which he undoubtedly possessed of obtaining a writ of certiorari "to quash the order for his dismissal prevents his application to "the court for a declaration as to the invalidity of the order of "dismissal"; and again[7]: "The case of *Andrews* v. *Mitchell*[8] "seems to me to support the view that a claim for a declaration "that a statutory body acted without jurisdiction can be dealt "with by an action for a declaration that the decision in question "was null and void."

The headnote to *Andrews* v. *Mitchell*,[8] to which Greer L.J. referred, reads: "Section 68 of the Friendly Societies Act, 1896, "which enacts that every dispute between a member of a "friendly society and the society shall be decided in manner "directed by the rules of the society, and that the decision so "given shall be binding and conclusive on all parties without "appeal, does not apply to a decision given by the arbitration committee without jurisdiction, the rules having been disregarded

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[4] Ibid. 313.
[5] Ibid. 317.
[6] Ibid. 321.
[7] Ibid. 324.
[8] [1905] A.C. 78.

"upon a question of substance. A member of a friendly society "was duly summoned before the arbitration committee for a "breach of the rules, and was in his absence expelled from "the society by a resolution of the committee upon a different "charge, namely, of fraud and disgraceful conduct, of which no "written notice had been given to him as required by the "rules:—*Held*, that the decision was null and void."

The member who was expelled from the society sued the trustees in the county court at Carmarthen, claiming damages for wrongful expulsion and for an injunction. The county court judge held that he had jurisdiction to hear the motion. He adjourned the hearing; a summons was taken out by the appellants for a writ of prohibition to the county court, and that was dismissed by Darling J., whose decision was affirmed by the King's Bench Division, the court consisting of Lord Alverstone C.J., Wills and Channell JJ., and by the Court of Appeal. There was an appeal to the House of Lords, and the appeal was dismissed. In the course of the argument Mr. A. T, Lawrence K.C., on behalf of the trustees of the society, said [9]: "In any case, the county court has no jurisdiction to hear his "complaint until the decision of the arbitration committee has "been set aside." That is virtually the same point as that which is taken by Mr. Paull here.

Lord Halsbury L.C. pointed out in his speech [10]: "When "one looks to see what the course of procedure must necessarily "be in order to justify an expulsion, Mr. Lawrence points out "that there is a rule which certainly does justify expulsion, but "it justifies expulsion upon the express proviso that the charge "has been made as provided by the rules. In this case the "charge never was made as provided by the rules; and if you "have no power given under the rules to expel a member except "upon a charge made and tried according to the rules, you have "no power to expel in a case like this."

Lord Davey said [11]: "My Lords, I concur in the observations "of my noble and learned friend as to the importance of "upholding these domestic tribunals of friendly societies, and "not lightly interfering with their decisions. But this is not in "my opinion a question of irregularity or informality—it is a "question of substance," and later [12]: "But it was an "informality which went to the root of the jurisdiction, and the

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[9] Ibid. 80.

[10] Ibid. 81.

[11] Ibid. 82.

[12] Ibid. 83.

"omission to follow the directions of the rules for preferring "charges has had the unfortunate effect of making the resolution "which was come to for the expulsion of the respondent, in my "opinion, altogether null and void."

The House of Lords thus held that an action in the courts could be brought in those circumstances to put right the wrong which otherwise would be done. In both those authorities it may well be said that the question was akin to a question of jurisdiction. The speech of Lord Davey shows that his view was really expressed on the rules of the society. The point argued by counsel for the trustees of the friendly society that the action would not lie failed.

In the present case, if the question is not one of jurisdiction, it is certainly closely akin to it. The local board had no jurisdiction to delegate; the port manager had no jurisdiction to adjudicate; each purported so to do; and in this case, as in *Cooper* v. *Wilson*,[13] a writ of certiorari was of no use. It could be of no use to the plaintiffs in this case. They did not know of the illegality which gave rise to the preliminary point until long after the time for the writ had run, and the question which has been argued before us was not before the appeal tribunal at all. In the circumstances, I am of opinion that the court has power to grant to the plaintiffs a declaration that their suspension was wrongful.

I am more concerned whether that relief should be granted. It is a matter for the discretion of the court, and that discretion should be exercised sparingly. If it had been the only question in issue, I should have doubted even more whether this court ought to grant the relief sought; but throughout this case the defendants have strenuously argued that the local board had the right to delegate their disciplinary powers and had done so properly, and, further, that by their appeals the plaintiffs had put themselves into such a position that they were not entitled to any relief. It was only on the fifth day of the appeal that Mr. Paull told the court that he was instructed to say that if this court said that the local board could not delegate their powers, the board would abide by that. No one can say that the case has not been fully argued on both sides; the grievances of one side and of the other have been ventilated fully in two courts. I am in favour of allowing the appeal against the judgment in favour of the first defendants to the extent of granting to the plaintiffs

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[13] [1937] 2 K.B. 309.

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the declaration asked for in the prayer, that is, a declaration that the purported suspensions were unlawful; and that is the order which I think this court should make.

DENNING L.J. stated the facts and continued: The first matter on which the men asked for the ruling of the court was whether the orders to load craft on weekdays from 2 o'clock until 10 o'clock, and on Saturdays until 2 o'clock, were lawful orders which they were bound to obey. In the course of the discussion before us it became clear that this depended on whether the method of unloading raw sugar in bulk by grabs was governed by the existing custom and practice (in which case the orders were not lawful because they conflicted with the existing custom): or whether it was an entirely new traffic for which no custom, practice or usage had been established (in which case the orders were lawful because the men would then be bound to obey them under the working rules which had been agreed by their union).

McNair J., who tried the case and who knows a great deal about these things, found that it was an entirely new traffic. The men sought in this court to challenge the judge's finding on this point. When it was pointed out that this was a question of fact, they no longer persisted in it and accepted the inevitable consequence of having their appeal on this point dismissed. The employers thereupon dropped out of the case.

The second matter on which the men sought the ruling of the court was the question of procedure; whether they had been lawfully suspended; and this involved a consideration of the disciplinary powers of the board. Under the Dock Workers (Regulation of Employment) Scheme, 1947, the power to suspend a man is entrusted to the local dock labour board, which is composed of equal numbers of representatives of the workers and employers. In this case the board did not themselves suspend the men; the port manager did. The local board did not have anything to do with it; they did not see the report made by the employers; they did not investigate the matter; they did not make any decision upon it themselves; they left it all to the port manager. The suspension was not brought to their notice until after the appeal tribunal had given its decision.

It was urged on us that the local board had power to delegate their functions to the port manager on the ground that the power of suspension was an administrative and not a judicial function. It was suggested that the action of the local board in suspending a man was similar in character to the action of an employer in dismissing him. I do not accept this view. Under the provisions of the scheme, so far from the board being in the position of an employer, the board are put in a judicial position between the men and the employers; they are to receive reports from the employers and investigate them; they have to inquire whether the man has been guilty of misconduct, such as failing to comply with a lawful order, or failing to comply with the provisions of the scheme; and if they find against him they can suspend him without pay, or can even dismiss him summarily. In those circumstances they are exercising a judicial function just as much as the tribunals which were considered by this court in the corn-porters' case, *Abbott* v. *Sullivan*,[14] and in *Lee* v. *Showmen's Guild of Great Britain*,[15] the only difference being that those were domestic tribunals, and this is a statutory one. The board, by their procedure, recognize that before they suspend a man they must give him notice of the charge and an opportunity of making an explanation. That is entirely consonant with the view that they exercise a judicial function and not an administrative one, and we should, I think, so hold.

While an administrative function can often be delegated, a judicial function rarely can be. No judicial tribunal can delegate its functions unless it is enabled to do so expressly or by necessary implication. In *Local Government Board* v. *Arlidge*,[16] the power to delegate was given by necessary implication; but there is nothing in this scheme authorizing the board to delegate this function, and it cannot be implied. It was suggested that it would be impracticable for the board to sit as a board to decide all these cases; but I see nothing impracticable at all; they have only to fix their quorum at two members and arrange for two members, one from each side, employers and workers, to be responsible for a week at a time: probably each pair would only have to sit on one day during their week.

Next, it was suggested that even if the board could not delegate their functions, at any rate they could ratify the actions of the port manager; but if the board have no power to delegate their functions to the port manager, they can have no power to ratify what he has done. The effect of ratification is to make it equal to a prior command; but just as a prior command, in the shape of a delegation, would be useless, so also is a ratification.

[14] [1952] 1 K.B. 189; [1952] 1 T.L.R. 133; [1952] 1 All E.R. 226.

[15] [1952] 2 Q.B. 329.

[16] [1915] A.C. 120.

Finally, Mr. Paull said (and it was his principal argument) that these courts have no right to interfere with the decisions of statutory tribunals except by the historical method of certiorari. He drew an alarming picture of what might happen if once the court intervened by way of declaration and injunction. It meant, he said, that anyone who was dissatisfied with the decision of a tribunal could start an action in the courts for a declaration that it was bad, and thus, by a side-wind, one could get an appeal to the courts in cases where Parliament intended that there should be none. I think that there is much force in Mr. Paull's contention; so much so that I am sure that in the vast majority of cases the courts will not seek to interfere with the decisions of statutory tribunals; but that there is power to do so, not only by certiorari, but also by way of declaration, I do not doubt. I know of no limit to the power of the court to grant a declaration except such limit as it may in its discretion impose upon itself; and the court should not, I think, tie its hands in this matter of statutory tribunals. It is axiomatic that when a statutory tribunal sits to administer justice, it must act in accordance with the law. Parliament clearly so intended. If the tribunal does not observe the law, what is to be done? The remedy by certiorari is hedged round by limitations and may not be available. Why then should not the court intervene by declaration and injunction? If it cannot so intervene, it would mean that the tribunal could disregard the law, which is a thing no one can do in this country.

The authorities show clearly that the courts can intervene. A good instance of the remedy by injunction is *Andrews* v. *Mitchell*,[17] when a statute enacted that the decision of a particular tribunal should be "binding and conclusive on all parties "without appeal, and shall not be removable into any court of "law or restrainable by injunction"[17]; but nevertheless the House of Lords held that the court could, in an action for an injunction, set aside a decision which was not given in accordance with the rules. A good instance of the remedy by declaration is *Cooper* v. *Wilson*,[18] where a watch committee, erected under statute, had dismissed a police serjeant when they had no power in law to do so, and had also acted in a way contrary to natural justice. Greer and Scott L.JJ. held that on both grounds the serjeant was entitled to a declaration that the order of the watch committee was invalid. Furthermore, in *Leeson* v. *General*

[17] [1905] A.C. 78, 79.

[18] [1937] 2 K.B. 309.

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Council of Medical Education and Registration,[19] and in *Allinson* v. *General Council of Medical Education and Registration*,[20] this court assumed without question that the court has power to intervene by declaration and injunction in the case of statutory tribunals just as it has in domestic tribunals, and I do not think that we should admit of any doubt upon it. We had occasion to examine the power in respect of domestic tribunals in *Lee* v. *Showmen's Guild of Great Britain*.[21] The power is no less in respect of statutory tribunals.

This is not, however, the occasion to lay down the bounds of the jurisdiction. We have to consider here two decisions: first, the decision to suspend the men; second, the decision of the appeal tribunal. So far as the decision to suspend is concerned, as I see it, we are not asked to interfere with the decision of a statutory tribunal; we are asked to interfere with the position of a usurper. The port manager (if he will forgive my saying so) is a usurper, or, at any rate, is in the position of a usurper. I do not mean this unkindly, because I know that he acted in good faith on the authority of the board; nevertheless, he has assumed a mantle which was not his, but that of another. This is not a case of a tribunal which has a lawful jurisdiction and exercises it; it is a case of a man acting as a tribunal when he has no right to do so. These courts have always had jurisdiction to deal with such a case. The common law courts had a regular course of proceeding by which they commanded such a person to show by what warrant—quo warranto—he did these things. Discovery could be had against him, and if he had no valid warrant, they ousted him by judgment of ouster. In modern times proceedings by quo warranto have been abolished and replaced by declaration and injunction: see section 9 of the Administration of Justice Act, 1938. Side by side with the common law jurisdiction of quo warranto the courts of equity have always had power to declare the orders of a usurper to be invalid and to set them aside. So at the present day we can do likewise. We can declare that the suspension ordered by the port manager was unlawful and void. We can declare it to be the nullity which in law it was.

So far as the decision of the appeal tribunal is concerned, it seems to me that, once the port manager's order is found to be a nullity, it follows that the order of the appeal tribunal is also a nullity. The appeal tribunal has no original jurisdiction of its own; it cannot itself make a suspension order; it can only affirm or disaffirm a suspension order which has already been made. If none has been made because it is a nullity, the tribunal can do nothing. It cannot make something out of nothing any more than anybody else can: see *Toronto Railway Co.* v. *Corporation of the City of Toronto.*[22] Mr. Paull argued that the appeal tribunal itself, if the point had been taken before it, could have decided whether the board had power to delegate or not: and that if the appeal tribunal had decided that there was power to delegate to the port manager, their decision could not have been reviewed in these courts. I do not agree with this. An inferior tribunal cannot by a wrong decision in point of law give itself a jurisdiction which it would not otherwise possess.

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[19] (1890) 43 Ch.D. 366.
[20] [1894] 1 Q.B. 750.
[21] [1952] 2 Q.B. 329.

In the course of the argument, Mr. Paull was compelled to admit that if the men had no remedy by way of declaration they had no remedy at all. He agreed that the men in this case could not have obtained redress by certiorari for the simple reason that they did not know the facts. In certiorari there is no discovery, whereas in an action for a declaration it can be had. The men only discovered the true position shortly before the trial, two and a half years after the suspension. That shows that but for these proceedings the truth would never have been known. The port manager could have gone on indefinitely assuming a jurisdiction which did not belong to him, and the men would be subjected to penal orders which were null and void, and they would have had no redress. I should be sorry to think that these courts were powerless to put right such a situation.

To sum up, therefore, the position is this: these men were in 1950 involved in an industrial dispute with their employers; it was a genuine dispute on which there was much to be said for each side. It involved difficult questions of the interpretation of industrial agreements and of the custom and practice of the firm. It could hardly be said that the men had committed an offence in the ordinary sense of the word simply by adhering to their point of view. Yet penalties were imposed on them as if they had done something wrong, and they were imposed by an official who had no jurisdiction to impose them, and had not waited for the proper time to hear their explanation. I hasten to say that it was not the fault of the official, who is a man well spoken of by all. It was the fault of the system. The lightermen felt that they had not been treated justly, and they sought redress in the

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[22] [1904] A.C. 809, 815.

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Queen's courts. Yet it is said by the board that the Queen's courts have no power to interfere. Let us take that argument into account by all means, but let us also remember that if the men cannot get redress here, they can get it nowhere else. I think that they are entitled to redress, and I agree with my Lord that we should declare that the suspension was unlawful.

ROMER L.J. I also agree, and the points which have been argued before us have been so fully and carefully examined by my Lords that there is very little that I myself wish to add.

On the delegation question, to which the local board have attached so much importance, it seems to me that there are one or two elements present in this Dock Workers (Regulation of Employment) Scheme, 1947, which are worthy of notice. In the first place, the local dock board are themselves delegates because they exercise, at all events in the main, if not wholly, functions which are delegated to them by the National Dock Labour Board which, under clause 3 of the scheme, is to be responsible for the administration of the scheme. By clause 3 (3) it is provided: ". . . it shall be the duty of the National Board to delegate to " the local boards, as many as possible of the functions of the " National Board, being functions which in the opinion of the " National Board can appropriately be so delegated and to consult " fully with the relevant local board on all such matters as it " considers appropriate, so, however, that the final determination " under paragraph 1 (*c*) of this clause shall not be so delegated," and then under clause 6, which specifies the functions of the local boards, it sets out a considerable number of activities, and ends up by providing: " (*g*) such other functions as may from " time to time be delegated to it by the National Board." So, therefore, you find that primarily these local boards are themselves delegates; and there is the well-established principle of law that, prima facie, a person to whom powers or duties are delegated cannot himself delegate their performance to someone else. That is the general rule; but in the scheme there is one express exception to it, because it is provided by clause 5 (7): " The local board shall from time to time appoint appeal tribunals " for the purpose of appeals under the scheme, and shall, if neces- " sary, appoint a registration committee to whom it may delegate " such duties as it may think fit in relation to the registers both " of dock workers and of employers of dock workers."

There, it is to be observed, is an express exception to the general rule to which I have referred, and by application of the principle expressio unius est exclusio alterius, it appears to me to confirm the view that, except in regard to that one particular matter, no delegation was in contemplation under the scheme.

One then approaches the particular functions which have arisen on this appeal, the disciplinary functions of the local board, and their powers and duties in that regard, as conferred and set out in clauses 15 and 16 of the scheme, cannot, as I see it, be regarded as administrative. The decision whether or not to impose penalties (amounting in serious cases to dismissal) for alleged offences if those offences are proved, is a judicial decision, or, at all events, a quasi-judicial decision, and cannot from any reasonable point of view be regarded as merely administrative; and as my Lords have pointed out, a judicial function is one which from its very nature is incapable of being delegated. No one has heard of an arbitrator who has been agreed on between the parties to a dispute being allowed to appoint someone to act in his place, because it is of the very essence of his office that he himself is the person who has to deal with the dispute referred to him. So, here, the workmen under this scheme are entitled to have the minds of the local board brought to bear on any complaint which is made against them before that complaint is implemented in the form of penal sanction, and it is no answer for the board to say: "We cannot do it ourselves; there are too "many of these complaints; we are delegating it to a man whom "we trust and for whom everyone has the greatest regard, the "port manager, Mr. Hogger"; because however efficiently he may, and, I have no doubt, did, perform that office, he is not the person who is the tribunal named in the scheme and to whose consideration the men are entitled. Accordingly, they cannot be compelled under this scheme to accept any decision other than that of the local board itself.

The only substantial argument to the contrary was based on the evidence of Mr. Hogger, who said that he had a number of reports, or man-cases, which had to be dealt with each year, amounting, as he said, to over 20,000 in the course of a year, though many of them would be included in one report. The practice as to them is for those reports to be considered by the local committees notwithstanding the provisions in clause 15 (4) that the local board shall consider them. Mr. Paull said it would be quite impossible for the local board itself to consider all those written reports, and that it is therefore a matter of necessary inference under clause 15 (4), that in that regard they should have power to delegate. I think that one answer to that is this, that there is nothing to prevent the board from increasing its numbers, and there is nothing to prevent the board from acting through quorums laid down itself under the powers conferred by clause 5 (9) of the scheme. It may be that the whole of the original reports could not, even then, at all events with convenience, be dealt with by the board itself, but what certainly could be considered by the board are the reports which result in disciplinary action, the ones which were dealt with in fact by Mr. Hogger, and which he said in his evidence occupied some two days a week of his time. Those could be, or, at all events, there was no evidence to show that they could not be, considered by the board, and I see no reason why the board should not do what it is bound to do, namely, consider these reports before action is taken, even if it involves an increase in the size of the board.

With regard to the reports which do not result in disciplinary action, no harm would be done to the men by delegation (even though strictly irregular). But it is quite impossible to spell out of the fact, if it be a fact, that the board cannot consider all the reports referred to in clause 15 (4), the inference which Mr. Paull asks us to draw, namely, that delegation was in contemplation by the draftsman of the scheme. I quite agree with my Lords that there is no power in the board to delegate its judicial functions, its disciplinary functions, either under clause 15 or under clause 16, to any outside person or persons.

On Mr. Paull's preliminary point, all I wish to say is this, that prima facie it is the right of everyone in this country who is involved in a legal dispute to have that dispute determined by Her Majesty's courts. That right can be taken away; sometimes it can be taken away by contract, subject to certain safeguards, and it certainly may be taken away by statute; but except to the extent to which it is taken away (and here we are only concerned with parliamentary intervention) then prima facie that right remains.

It was a part of Mr. Paull's argument under this heading that the legislature in this scheme had expressly referred to the appeal tribunal all disputes initiated by aggrieved persons, that is to say, persons who are aggrieved under the scheme; and that the tribunal accordingly has exclusive jurisdiction to determine all questions of law arising out of an appeal, including questions of law on which might depend the existence or non-existence of its own jurisdiction; and applying that general consideration to the particular circumstances of this case, he said that the appeal tribunal had jurisdiction to decide whether the delegation of the judicial function to Mr. Hogger by the local board was valid, and if it gave an affirmative answer to that question, then it had jurisdiction to deal with any appeal from Mr. Hogger; that it did so; and that accordingly its decision was not open to review except by way of certiorari. On that, I myself am by no means satisfied that such a power is conferred by this scheme on the tribunal, i.e., an exclusive power to decide what is essentially a question of law, namely, the question of construction on this delegation point, and to decide it in such a way as to found a jurisdiction for itself so as to exclude any person affected by its decision from coming to these courts for relief by way of declaration or injunction. It seems to me that before one can conclude that such an exclusive power is conferred on a lay tribunal of this sort one would have to have clearer language than is to be found in this scheme. Further, it is plain that whether or not it had power to do so, it never did investigate that question; it never did arrive at a decision on that question, because that question was never present to anyone's mind at all. It was a matter of assumption and not of decision that the delegation was valid, and therefore that Mr. Hogger's decision was valid. Accordingly, it seems to me that the principle on which Mr. Paull relied on that point does not avail him in the present case.

As to the rest, it seems to me, for the reasons my Lords have given, founded as they are on the decisions to which they have referred, including *Cooper* v. *Wilson*[23] and *Andrews* v. *Mitchell*[24] and the two *General Medical Council* cases,[25] that there is good and sufficient ground for our holding that in the circumstances of this case it is open to this court to make a declaration of the kind which my Lord has mentioned, and it is proper that we should make that declaration.

Appeal allowed against judgment in favour of first defendants. Cross appeal dismissed.

Appeal against judgment in favour of second defendants dismissed.

Solicitors: *Harold Miller & Co.; G. Grinling Harris; Linklaters & Paines.*

M. M. H.

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[23] [1937] 2 K.B. 309.

[24] [1905] A.C. 78.

[25] *Leeson* v. *General Medical Council* (1890) 43 Ch.D. 366; *Allinson* v. *General Medical Council* [1894] 1 Q.B. 750.

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Apr. 11, 12.

Singleton,
Jenkins and
Morris L.JJ.

REGINA *v.* COMPTROLLER-GENERAL OF PATENTS AND DESIGNS. *Ex parte* PARKE, DAVIS & CO.

Patent—Application for compulsory licence—Patent relating to medicine—Application of provisions of international convention—Right to order of prohibition—International Convention for the Protection of Industrial Property, 1934, (1938, *Cmd. No.* 5833), *Treaty Series No.* 55 (1938), *art.* 5A (4)—*Patents Act,* 1949 (12, 13 *&* 14 *Geo.* 6, *c.* 87), *ss.* 41 (1), 45 (3).

Article 5A (4) of the International Convention for the Protection of Industrial Property, 1934, which provides that a compulsory licence may not be granted within three years of the date of issue of a patent, relates only to the prevention of abuses resulting from the exercise of exclusive rights conferred by patents. Therefore the powers of the Comptroller-General of Patents to grant a compulsory licence in respect of food and medicine under section 41 (1) of the Patents Act, 1949, which is not concerned with such abuses, are not fettered by article 5A (4). Accordingly the grant of a compulsory licence under section 41 (1) within the three-year period is not inconsistent with treaty obligations.

Decision of Divisional Court [1953] 2 W.L.R. 760; [1953] 1 All E.R. 862 affirmed.

APPEAL from Divisional Court.

The appellants, Parke, Davis & Co., a company incorporated in the United States of America, having discovered a non-toxic antibiotic, to which they gave the name of chloramphenicol and to which they applied the brand name chloromycetin, filed patent specifications disclosing their methods of synthesis, in respect of which patents had been granted in the United States and in England, pursuant to the International Convention for the Protection of Industrial Property, 1934. British Drug Houses Ld. applied to the Comptroller-General of Patents under section 41 (1) of the Patents Act, 1949, for the grant of a compulsory licence in respect of three patents based on convention applications, Nos. 652,273, 652,280 and 660,381, which had been issued respectively on August 1, 1951, February 20, 1952, and May 20, 1952, relating to the synthesis of chloramphenicol. The comptroller, having followed the procedure set out in section 43 (2) [1] of the Act, was apparently satisfied that a prima facie case for the granting of a compulsory licence had been made out and that he had jurisdiction to make the order sought.

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[1] Patents Act, 1949, s. 41: "(1) "Without prejudice to the foregoing "provisions of this Act, where a "patent is in force in respect of— "(a) a substance capable of being "used as food or medicine . . . ; or "(b) a process for producing such a "substance as aforesaid . . . the comptroller shall, on application made to "him by any person interested, order "the grant to the applicant of a "licence under the patent on such "terms as he thinks fit, unless it "appears to him that there are good

In the above circumstances Parke, Davis & Co. applied to the Divisional Court for an order of prohibition directed to the comptroller, requiring him to refrain from considering the application of British Drug Houses Ld., on the ground that his powers under section 41 (1) were fettered by the provisions of section 45 (3),[1] which applied the provisions of article 5A [1] of the International Convention to section 41; and, accordingly, that the comptroller had no jurisdiction to entertain the application for a compulsory licence within three years from the date of the issue of the patents.

It was admitted that the applications to the comptroller related to the field of medicine, bringing them within the orbit of section 41,[1] and it was not disputed that three years had not elapsed since the issue of the earliest of the patents.

On March 20, 1953, the Divisional Court (Lord Goddard C.J., Lloyd-Jacob and Parker JJ.) refused an order of prohibition.

Parke, Davis & Co. appealed.

D. N. Pritt Q.C., *K. E. Shelley Q.C.* and *G. T. Aldous* for Parke, Davis & Co. The comptroller had no jurisdiction to hear

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"reasons for refusing the application."

S. 43: "(2) Where the comptroller "is satisfied, upon consideration of "any such application, that a prima "facie case has been made out for "the making of an order, he shall "direct the applicant to serve copies "of the application upon the patentee "and any other persons appearing "from the register of patents to be "interested in the patent in respect of "which the application is made, and "shall advertise the application in "the Journal."

S. 45: "(3) No order shall be made "in pursuance of any application "under sections thirty-seven to forty-"two of this Act which would be at "variance with any treaty, conven-"tion, arrangement or engagement "applying to the United Kingdom "and any convention country."

International Convention for the Protection of Industrial Property, 1934, art. 5A: "1. The importation "by the patentee into the country "where the patent has been granted "of articles manufactured in any "of the countries of the Union "shall not entail revocation of the "patent. 2. Nevertheless each of the "countries of the Union shall have "the right to take the necessary "legislative measures to prevent the "abuses which might result from the "exercise of the exclusive rights con-"ferred by the patent, for example, "failure to work. 3. These measures "shall not provide for the revocation "of the patent unless the grant of "compulsory licences is insufficient to "prevent such abuses. 4. In any "case, an application for the grant "of a compulsory licence may not be "made before the expiration of three "years from the date of the issue of "the patent, and this licence may "only be granted if the patentee is "unable to justify himself by legiti-"mate reasons. No proceedings for "the revocation of a patent may be "instituted before the expiration of "two years from the date of the grant-"ing of the first compulsory licence."

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the application and grant a compulsory licence within three years from the date of the patents. If there was no jurisdiction, then it is a typical case for an order of prohibition. All three patents are concerned with food or medicine and therefore fall within a special category. By section 41 (1) of the Patents Act, 1949, where a patent is in force in respect of a substance capable of being used as food or medicine or in the production of food or medicine, the comptroller shall on application made to him by any person interested order the grant of a licence under the patent on such terms as he thinks fit, "unless it appears to him that the "holder shows good reason why he should not." Section 45 (3) is important, because it brings in the argument of the patentees. It provides that no order shall be made in pursuance of any application under sections 37 to 42 of the Act which would be at variance with any treaty or convention applying to the United Kingdom and any convention country. The patents in question are convention patents and it is therefore necessary to see whether there exists a convention which would prevent an application for a compulsory licence being made under sections 37 to 42 within three years from the date of the patent. In 1938 an International Convention for the Protection of Industrial Property was ratified by Great Britain, and article 5A (4) of that convention provides: "In any case an application for the grant of a compulsory licence "may not be made before the expiration of three years from the "date of the issue of the patent, and this licence may only be "granted if the patentee is unable to justify himself by legitimate "reasons. . . ." The argument for the British Drug Houses Ld., which was approved by the Divisional Court, was that paragraphs (2), (3) and (4) of article 5A apply only to cases of abuse of monopoly and not to section 41 (1). The patentees contend that the opening words of paragraph (4) "In any case" should be interpreted as "in every case," and that the convention is intended to cover the whole patent law of every convention country. The decision of the Divisional Court should be reversed.

Sir Hartley Shawcross Q.C. and *J. P. Graham Q.C.* for British Drug Houses Ld. The short point in this appeal turns on the construction of article 5A (4). Where at the time of the passing of a Patents Act there has been in existence an international convention, which laid down the general rules, the practice of the British Parliament has always been to translate that convention into legislation. Article 5A of the Convention of 1934, ratified in 1938, was only intended to deal with the measures which a State might take where a patentee, to whom had been granted monopoly rights, had abused those rights. It was never intended in this country to restrict the right of the State to use food or medicine patents by the grant of licences, irrespective of any abuse by the patentee. The policy of this country was to make sure that machinery was available to secure food and medicine on reasonable terms, and to prevent the holding up of the public to ransom. It would be very astonishing if a first patentee could for three years prevent the use of a discovery which was capable of bringing enormous benefit to mankind. It would be unreasonable to think that any convention State would commit itself to any such restriction. The inventor might produce to the utmost of his capacity and yet be unable to satisfy public demand, and in those circumstances compulsory licences should be granted on reasonable terms to those who had the capacity to increase production.

Until 1925 there was no time limit in regard to the grant of compulsory licences, so far as international treaties were concerned, but there were time limits protecting patentees against revocation. If the Convention of 1934 had said, in express terms, that no compulsory licence should be granted in respect of food or medicine within three years, that would have had to be taken into account by the comptroller, but the court is now being asked to say that this country had deliberately deprived itself for three years of the right to grant compulsory licences in respect of food and medicine, although previously there had been no such restriction. Article 5A is concerned only with compulsory licences and revocations in cases where abuse of monopoly is alleged, and it has no application to section 41 of the Act of 1949, which is concerned only with patents for substances capable of being used as food or medicine, where the comptroller "shall" grant a licence "unless it appears to him that there are good reasons for "refusing" to do so. The patentee is not called upon, as in paragraph (4) of article 5A, to "justify himself."

Shelley Q.C. in reply.

Sir Lionel Heald A.-G. and *P. J. Stuart Bevan*, for the comptroller, were not called upon for argument as to whether the fact that under the Act of 1949 there was a right of appeal from the comptroller to the Appeal Tribunal was an obstacle to the granting of an order of prohibition.

SINGLETON L.J. stated the facts, and having read the material paragraphs of the statement filed by the appellants pursuant to Ord. 59, r. 3 (2), continued: The Divisional Court dismissed the motion for an order of prohibition after hearing counsel for the appellants and for British Drug Houses Ld. The court also heard the Attorney-General on behalf of the Comptroller-General on the question whether prohibition would lie in a case of this nature where a right of appeal is specifically given. We have not thought it necessary to hear the Attorney-General upon that matter in view of the conclusion at which this court has arrived on the merits of the appeal generally.

The history of the law in relation to patents goes back to the year 1883. The Patents and Designs Act, 1907, was amended by a number of Acts which followed. Over a considerable period of years there have been international conventions held from time to time to bring about, as far as possible, agreement as to the rights of patentees in the countries which were parties to the conventions. As Sir Hartley Shawcross pointed out, after there had been a convention and the delegates had agreed upon certain articles, those articles were put before the governments of the countries concerned, and in due course in this country legislation followed, and there followed almost immediately the formal ratification of the convention by the government of this country. For some 30 years before the year 1949 legislation had dealt specifically with manufactured articles which might be for use as food or medicine. The amending Act of 1919 introduced specific provisions for patents in relation to food and drugs, and matters of that kind have not been, so far as we are told, the subject-matter of any agreement at any convention. But over a considerable period of years other patented articles were made subject to an international obligation embraced in the agreed article or articles resulting from the convention.

In 1925, as a result of agreements at The Hague, an article was put forward, and ultimately ratified in this country, that individual States could deal with abuses of monopoly by legislation, subject to two things: (1) that compulsory licences could not be granted for three years after the date of the letters patent; and (2) that there should be revocation only if compulsory licensing was insufficient. In 1928 that was effected in the amending Act, the Patents and Designs (Conventions) Act, 1928, which by section 2 amended section 27 of the principal Act so as to put into the section the provision that there should be no grant of a compulsory licence for three years from the date of the grant of the letters patent.

That system has been followed ever since; the amendment of the Act of 1928 followed the article of 1925, which, in turn, was ratified by the British Government on May 1, 1928. Article 5 of the Convention of 1925 contains these provisions: " The importa-" tion by the patentee into the country where the patent has been " granted of articles manufactured in any of the countries of the " Union shall not entail revocation of the patent. Nevertheless " each of the contracting countries shall have the right to take " the necessary legislative measures to prevent the abuses which " might result from the exercise of the exclusive rights conferred " by the patent, for example, failure to work. These measures " shall not provide for the revocation of the patent unless the grant " of compulsory licences is insufficient to prevent such abuses. In " no case can the patent be made liable to such measures before " the expiration of at least three years from the date of grant of the " patent and then only of the patentee is unable to justify himself " by legitimate reasons." I think that it is agreed—it certainly could not be disputed—that that provision in article 5 of the Convention of 1925 was concerned with that which has been spoken of as " abuses of monopoly." In such circumstances the contracting countries had the right " to take the necessary legislative " measures to prevent the abuses which might result from the " exercise of the exclusive rights conferred by the patent, for " example, failure to work," but in no case could the patent " be " made liable to such measures before the expiration of at least " three years from the date of the grant of the patent."

At that time there had been in the law of this country for some years the specific provisions for licences in respect of food and drugs, and those provisions must have been known to the delegates who were present at The Hague when the agreement of 1925 was reached. It has not been suggested that the article of 1925, to which I have referred, or the Act of 1928, affected patents in relation to food and drugs in any degree.

In 1934 there was another convention, and that was followed by the Patents, etc. (International Conventions) Act, 1938, which received the Royal Assent on May 26, 1938, and, following the usual practice, His Majesty's ratification in respect of the United Kingdom of the articles agreed upon by the convention was signified on June 30 of the same year. The wording of article 5 was changed to a slight degree. I will read the parts of article 5A of the Convention of 1934 which are material: " (1) The importa-" tion by the patentee into the country where the patent has been " granted of articles manufactured in any of the countries of the " Union shall not entail revocation of the patent. (2) Neverthe-" less each of the countries of the Union shall have the right to "take the necessary legislative measures to prevent the abuses "which might result from the exercise of the exclusive rights "conferred by the patent, for example, failure to work. (3) These "measures shall not provide for the revocation of the patent "unless the grant of compulsory licences is insufficient to prevent "such abuses." To all intents and purposes, those provisions are the same as the first three of article 5 in the Convention of 1925. Now I come to article 5A (4), and it is in this part that a change took place in the article of 1934. The wording is: "In any case, "an application for the grant of a compulsory licence may not be "made before the expiration of three years from the date of the "issue of the patent, and this licence may only be granted if the "patentee is unable to justify himself by legitimate reasons. No "proceedings for the revocation of a patent may be instituted "before the expiration of two years from the date of the granting "of the first compulsory licence."

I shall refer to the Patents Act of 1949, but before I leave article 5A (4) I would point out that the submission made on behalf of the applicants, who are appellants to this court, is that they having the patent rights in respect of certain substances which are concerned with the manufacture of food or medicine, no licence in respect of those patents can be granted until the expiration of three years from the date of the issue of the patent. It is common ground that a period of three years has not yet run from the issue of the patent in any of the three cases. So that though those manufactured articles are substances which may be used for food or for medical purposes, the appellants' case is that for three years from the date of the grant of the patent no licence can be granted by the comptroller. In other words, they claim that he has no jurisdiction to grant any such licence. If that claim is right, the result would be that whenever a patent had been issued for the manufacture of some valuable medicine, however little of it the patentees might be able to manufacture, for one reason or another, no licence could be granted to anyone else until the three years' period had elapsed.

That submission is based on the wording of article 5A (4) and on a change which was made in the law by the Patents Act, 1949, an Act to consolidate certain enactments relating to patents. The important part of the Act of 1949 is that which is headed: "Compulsory Licences," and which runs from section 37 to section 45. Section 37 deals with compulsory endorsements of licences. Subsection (1) provides: "At any time after the expiration of three "years from the date of the sealing of a patent, any person "interested may apply to the comptroller upon any one or more "of the grounds specified in the next following subsection for a "licence under the patent or for the endorsement of the patent "with the words 'licences of right.'" That section preserves the three years' period before which a licence cannot be obtained, and in so doing it is in accordance with the article which is applicable. By subsection (2): "The grounds upon which application "may be made for an order under this section are as follows, that "is to say: (*a*) that the patented invention, being capable of "being commercially worked in the United Kingdom, is not being "commercially worked therein or is not being so worked to the "fullest extent that is reasonably practicable; (*b*) that a demand "for the patented article in the United Kingdom is not being met "on reasonable terms, or is being met to a substantial extent "by importation; (*c*) that the commercial working of the invention in the United Kingdom is being prevented or hindered by "the importation of the patented article; (*d*) that by reason "of the refusal of the patentee to grant a licence or licences on "reasonable terms—(i) a market for the export of the patented "article manufactured in the United Kingdom is not being "supplied; or (ii) the working or efficient working in the United "Kingdom of any other patented invention which makes a "substantial contribution to the art is prevented or hindered; "or (iii) the establishment or development of commercial or "industrial activities in the United Kingdom is unfairly pre-"judiced; (*e*) that by reason of conditions imposed by the "patentee upon the grant of licences under the patent, or upon "the purchase, hire or use of the patented article or process, the "manufacture, use or sale of materials not protected by the "patent, or the establishment or development of commercial or "industrial activities in the United Kingdom is unfairly pre-"judiced."

These grounds (*a*) to (*e*), upon which application may be made for compulsory licence are, in my view, all in the nature of abuses of the monopoly. If one or other of those reasons occurred at any time after the expiration of three years from the date of the sealing of a patent, any person interested could apply for a licence. That section, as I have said, preserves the position as it was before in regard to the ordinary patented article or substance. Section 38 contains provisions as to licences under section 37. Section 39 relates to the exercise of powers on applications under section 37. Section 40 is concerned with endorsement, etc., on application of the Crown. To none of these need I refer.

Section 41 is concerned with inventions relating to food or medicine, etc. Subsection (1) provides: "Without prejudice to "the foregoing provisions of this Act, where a patent is in force in "respect of—(*a*) a substance capable of being used as food or "medicine or in the production of food or medicine; or (*b*) a "process for producing such a substance as aforesaid; or (*c*) any "invention capable of being used as or as part of a surgical or "curative device, the comptroller shall, on application made to "him by any person interested, order the grant to the applicant "of a licence under the patent on such terms as he thinks fit, "unless it appears to him that there are good reasons for refusing "the application." I draw attention to the word "shall," which appears in that subsection. In the provisions as to the grant of a compulsory licence in the case of other goods the statutory provision seems to have been in each statute "may." Then, by subsection (2): "In settling the terms of licences "under this section the comptroller shall endeavour to secure "that food, medicines, and surgical and curative devices shall "be available to the public at the lowest prices consistent with "the patentees' deriving a reasonable advantage from their "patent rights." Subsection (3) provides: "A licence granted "under this section shall entitle the licensee to make, use, "exercise and vend the invention as a food or medicine, or for "the purposes of the production of food or medicine or as or as "part of a surgical or curative device, but for no other purposes." Thus, if a person secured a licence under section 41 of the Act of 1949 the comptroller might impose terms, and the person who obtained the licence could use the invention as food or medicine or for the purposes of the production of food or medicine, but for no other purpose.

It seems to me that the scope of that section, which follows the principle of the earlier sections upon inventions relating to food or medicine, is that the comptroller should have the widest powers possible, and that he should so carry out his duties as to secure that food, medicine, and the like, can be available to the public at the lowest prices, consistent with the reasonable remuneration to the patentees. That section, if it stood by itself, would without doubt have preserved the position as it was before, because in section 41 there is no three years' bar or waiting period as there is in section 37; the old form is continued. But section 41 is followed by section 42, which is headed: "Revocation of patent," and that deals with something done under section 37 of the Act. It provides in subsection (1): "Where an order for the grant of a licence under a patent "has been made in pursuance of an application under section 37 "of this Act, any person interested may, at any time after the "expiration of two years from the date of that order, apply to "the comptroller for the revocation of the patent upon any of "the grounds specified in subsection (2) of the said section 37," and so on. I am inclined to think that it would have been very much better if section 42 had preceded section 41, as section 42 is really concerned with something under section 37, whereas section 41 deals with inventions relating to food or medicine, which had always been treated quite differently.

There follow section 43, which relates to procedure on applications under sections 37 to 42, and section 44, which is concerned with appeal and references to arbitrators. Then comes section 45, which appears to result from an effort to make this part of the Act tidy. Subsection (3) states: "No order shall be made in "pursuance of any application under sections 37 to 42 of this "Act which would be at variance with any treaty, convention, "arrangement or engagement applying to the United Kingdom "and any convention country." It is said, upon that subsection, that if the comptroller contemplates making an order for a compulsory licence, or licences such as British Drug Houses Ld. seek, he is doing something which would be at variance with article 5A (4), which says that: "In any case, an application for "the grant of a compulsory licence may not be made before the "expiration of three years from the date of the issue of the "patent."

I have found considerable difficulty in understanding why that provision of subsection (3) of section 45, which appears at first sight to make an order dealing with inventions relating to food and medicines subject to any article of any convention, was put into the Act, for patents in relation to foods and medicines had not been dealt with or considered, so far as I have seen, by any convention. Sir Hartley Shawcross faces that difficulty and points out that it may well be that section 41 was advisedly included in subsection (3) of section 45 because of something in some other convention which had gone before or something which might come afterwards. We were referred to one matter which is in Cmd. 7359, Treatment of German-Owned Patents, into which I do not propose to go. It may be that there is some reason for it, but I hope that I am not unduly critical when I say that I rather feel that something may have slipped in accidentally. That is not meant as criticism of the draftsman. The task of a draftsman is difficult indeed. It is even more difficult when one has to deal with the consolidation of a number of Acts relating to patents and has to attempt to align them with articles in various conventions over a number of years. But it has to be faced that subsection (3) of section 45 appears to bring inventions relating to food and medicine, which are dealt with in section 41, within the scope of articles resulting from conventions.

Thus the question for discussion on this appeal is: what is the true meaning of article 5A (4) of the International Convention for the Protection of Industrial Property, 1934? There are two observations I would make. The first, that I do not think that it is right to take the words in paragraph (4) by themselves and have no regard to that which has gone before or to that which follows immediately. The second, that the articles which we have are translations. The original is in French, and in the Convention of 1925 the one text is set against the other on opposite pages, whereas in the Convention of 1934 the one text follows on the other. Paragraph (4) of article 5A in both begins: "En tout cas." One would think that the English translation would be given the same way, but it is not. That is because of what follows: it has to be put into the proper framework. It is, as I have said, clear that article 5 of 1925 does not cover inventions relating to food or medicines. But it is submitted that the special provision of section 45 (3) of the Act of 1949, namely, "No order shall be made in pursuance of any application "under sections 37 to 42 of this Act which would be at variance "with any treaty, convention, arrangement or engagement "applying to the United Kingdom and any convention country," makes it necessary to examine this question carefully, and the more so in view of the change that was made in clause (4) in the year 1934. When the comptroller has before him an application under section 41 of the Act, it is his duty to bear in mind the provisions of subsection (3) of section 45 to see that he does not make an order which is at variance with anything in the article which he has to consider, in this case article 5.

Mr. Pritt and Mr. Shelley submitted on behalf of the appellants that the application of British Drug Houses Ld. was an application for the grant of a compulsory licence, and that that application could not be made before the expiration of three years from the date of the issue of the patent, and that

that time had not yet run. Therefore, it was said, the duty of the comptroller was to refuse the application forthwith, and not to consider it. On the other hand, the submission was that it was for the comptroller to consider the application made to him and to see, upon an examination of article 5, whether or not he was asked to do something which would offend against subsection (3) of section 45. The argument on behalf of British Drug Houses Ld. was that when article 5 was fully examined there was nothing which the comptroller was asked to do which could be said to be at variance with anything contained in the article.

Let me go back to article 5A (1): "The importation by the "patentee into the country where the patent has been granted "of articles manufactured in any of the countries of the Union "shall not entail revocation of the patent." Importation by the patentee into the country where the patent has been granted of articles manufactured elsewhere is something which the country which has granted the patent might regard as undesirable, and that is in the nature of an abuse of the monopoly. Then paragraph (2) provides: "Nevertheless each of the countries "of the Union shall have the right to take the necessary legislative measures to prevent the abuses which might result from "the exercise of the exclusive rights conferred by the patent, "for example, failure to work." The body of that article is preserving to the individual State the right to take the necessary legislative measures to prevent abuses of the monopoly. Then paragraph (3) provides: "These measures shall not provide for the "revocation of the patent unless the grant of compulsory "licences is insufficient to prevent such abuses." So far, just as in the 1925 article, one is dealing with abuses and with nothing else, abuses of the kind which are embraced in section 37 (2) of the present Act.

Now I come to paragraph (4). "En tout cas"—"in any case," said Mr. Shelley, and "in any case" means "in any case," not "in some cases." "In every case," said Mr. Pritt, and "in every case" means what it says, said Mr. Pritt. So the argument is that it means: In any case and in every case an application for the grant of a compulsory licence may not be made before the expiration of three years from the date of the issue of the patent. But the article does not end there; it continues "and this licence may only be granted if the patentee "is unable to justify himself by legitimate reasons." What meaning can be attached to those words? That thought does not come into the grant of a licence in regard to inventions relating to food or medicine. The guiding thought in section 41 appears to me to be that a person interested in that matter may apply to the comptroller for a licence, and thereupon "the "comptroller shall . . . order the grant to the applicant of a "licence under the patent on such terms as he thinks fit, unless "it appears to him that there are good reasons for refusing the "application." In view of the terms of section 41 (1) I do not see any bearing of the words in article 5A (4), "and this licence "may only be granted if the patentee is unable to justify himself "by legitimate reasons." There is nothing in respect of which the patentee has to justify himself. That consideration forces me to the conclusion that paragraph (4) of article 5A is dealing with the same subject-matter as paragraphs (1), (2) and (3) are, that is to say, abuses of the kind now embraced by section 37 (2) of the Act of 1949.

Paragraph (4) goes further: "No proceedings for the revocation "of a patent may be instituted before the expiration of two "years from the date of the granting of the first compulsory licence." I thought at one time that that meant, and I think that it was put to the court that it meant, that a compulsory licence could not be granted for three years and there could be no proceedings for the revocation of the patent before the expiration of two years from the date of the granting of the first compulsory licence. But Mr. Shelley pointed out that there is no provision anywhere in any of the Acts for the revocation of a patent in regard to substances relating to food or medicine, and I accept that at once. That seems to me to support the view which I have formed, that paragraph (4) is indeed throughout concerned with the same kind of thing as paragraphs (1), (2) and (3). That is the way in which I look at it, and although I recognize that the question which this court has to consider is one of construction, and construction alone, it seems to me that it would be an amazing thing if there had been a departure from the recognized practice of this country, which has been not to recognize, or to make any international arrangement in regard to, inventions relating to food or medicine. It would be surprising if in the result the legislature had by reason of section 45 (3) and article 5A (4) put the country in the position of not being able to grant a licence for the manufacture of articles of food or of much-needed medicines for a number of years. It would certainly be contrary to the practice which has been followed up to the Act of 1949, and I am relieved that on my view of the construction I have not to come to any such conclusion.

When this case was before the Divisional Court the first judgment was that of Lloyd-Jacob J., and he is reported as saying[1]: " As I read this article,"—that is article 5A—" it is " concerned to express the restrictions which the contracting " parties agree to accept on their right to take legislative " measures to prevent abuses resulting from the exercise of the " exclusive rights conferred by patents. Where it refers to " compulsory licences, the reference is to such as are concerned " with the prevention of such abuses. Sections 37–40 of the " Patents Act, 1949, set out the grounds on which such compulsory licences may be granted, and it is to be noted that " these sections conform to the provisions of the article. " Section 41, on the other hand, is concerned neither with the " exercise by the patentee of the rights conferred by the patent " nor with any abuse that may result therefrom. The sufficiency " or otherwise of compulsory licences to prevent abuses cannot " therefore arise and the possibility of revocation on the ground " of abuse does not exist. The section specifies that certain " patents, namely, those relating to food, medicine or surgical or " curative devices, shall be susceptible of exercise by persons " licensed by the comptroller, and this irrespective of the " exercise or non-exercise by the patentee. There is, therefore, " no default for which the patentee could be required to justify " himself by legitimate or, indeed, any reasons, and this provides " an additional differentiation from article 5A (4)."

I agree with that reasoning. In my opinion the judgment of the Divisional Court was right, and this appeal ought to be dismissed.

JENKINS L.J. I agree, and there is very little I can usefully add. Article 2 of the International Convention signed in London in 1934 provided, by paragraph (1): " Persons within the jurisdiction of each of the countries of the Union shall, as regards " the protection of industrial property "—which, for the purposes of the present case, means patents—" enjoy in all the " other countries of the Union the advantages that their respective laws now grant, or may hereafter grant, to their nationals, " without prejudice to the rights specially provided by the

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[1] [1953] 2 W.L.R. 760, 763; [1953] 1 All E.R. 863.

"present convention. Consequently they shall have the same "protection as the latter, and the same legal remedy against "any infringement of their rights, provided they observe the "conditions and formalities imposed on nationals."

At the date when that convention was signed the patent law of this country, which prima facie was the patent law which nationals of other countries of the Union would be entitled to enjoy in this country (subject to anything to the contrary contained in the convention), included section 38A of the Patents and Designs Act, 1907, introduced into the principal Act by the Patents and Designs Act, 1919, and providing by subsection (2): "In the case of any patent for an invention intended for or "capable of being used for the preparation or production of food "or medicine, the comptroller shall, unless he sees good reason "to the contrary, grant to any person applying for the same, a "licence limited to the use of the invention for the purposes of "the preparation or production of food or medicine but not "otherwise; and, in settling the terms of such licence and "fixing the amount of royalty or other consideration payable, "the comptroller shall have regard to the desirability of making "the food or medicine available to the public at the lowest "possible price consistent with giving to the inventor due reward "for the research leading to the invention."

It is admitted that this provision did not conflict with any provision of the convention which was in force down to the signing of the Convention of 1934. The previous convention was that signed at The Hague in 1925, and the only provision in it bearing upon the question raised in this case was article 5, which, it was agreed before us, was directed, and directed only, to the grant of compulsory licences in respect of patents, or the revocation of patents, on the ground of abuse; and had nothing to do with a licence compulsorily granted in respect of an invention intended for, or capable of being used for, the preparation or production of food or medicine under section 38A (2) of the Act of 1907.

The question in this case, therefore, is whether the revised form of article 5, adopted by the convention signed in 1934, had the effect of converting section 38A (2) from a perfectly legitimate provision, from the international point of view, into a provision which was at variance with the new article 5A. I think that one can fairly say that if the intention of article 5A of the Convention of 1934 was indeed to produce that not unimportant result, one would have expected such intention to be expressed in clear terms.

As to the construction of article 5A of 1934, on which this case in the end really turns, it is, as I have said, agreed that the corresponding provisions of article 5 of 1925 were concerned, and concerned only, with abuses. That it was so limited in its effect is made clear by the words: "In no case can the patent "be made liable to such measures before the expiration of at "least three years," and so on. That refers back to the reference to the "necessary legislative measures to prevent the "abuses which might result from the exercise of the exclusive "rights," and so on, and limits both the grant of a compulsory licence and the revocation of the patent to cases of abuse, as both those steps are included in the expression "such "measures."

It is said that in the new article 5A there is a most significant change of language, a change sufficiently marked to make it embrace the case of licences under patents in respect of food and medicine. Paragraph (1), concerning importation, is in the same terms as the old article 5. Article 5A continues, substantially in the same form as the old article 5, to provide by paragraph (2): "Nevertheless each of the countries of the Union shall have the "right to take the necessary legislative measures to prevent the "abuses which might result from the exercise of the exclusive "rights conferred by the patent, for example, failure to work." Then, again reproducing the old article 5, it says in paragraph (3): "These measures shall not provide for the revoca-"tion of the patent unless the grant of compulsory licences "is insufficient to prevent such abuses." Then in paragraph (4) comes the departure relied on as bringing in compulsory licences in respect of patents relating to food and medicine: "In "any case, an application for the grant of a compulsory licence "may not be made before the expiration of three years from the "date of the issue of the patent, and this licence may only be "granted if the patentee is unable to justify himself by legiti-"mate reasons. No proceedings for the revocation of a patent "may be instituted before the expiration of two years from the "date of the granting of the first compulsory licence."

As I have said, the change of language in paragraph (4) is strongly relied on by the appellants. As to that, I would say that, while there is certainly a change of language, it is not the change one would expect if the intention had been to produce the particular result contended for. One would have expected, I think, a reference to the varieties of compulsory licences, other than such as might be granted as a remedy for abuses, to which the article was directed. If compulsory licences of patents in respect of food and medicine, in regard to which there has been no abuse, are intended to be brought into the article, that is certainly done in a most obscure and devious fashion; and it must be remembered that some change of language was in any case required for the purpose of introducing the new two years' period of grace between the granting of the first compulsory licence and the institution of any proceedings for revocation.

Looking at the article as it stands in the 1934 form, the appellants rely on these matters. First of all, as to the view that the whole of the article relates to abuses, it is said that the word "abuses" and the phrase "abuse of monopoly rights" are vague and ambiguous expressions to which no precise meaning can be attached, and that it is impossible, therefore, to relate article 5A to matters of that kind, for that gives the article too uncertain and indefinite a field. I cannot accept that argument. The expression "abuse of monopoly rights"—and it is to abuses of that kind that the French equivalent word "abus" is obviously directed in this article—is an expression long used and well understood in patent matters. It means, in effect, conduct of the kind referred to in section 37 of the Act of 1949. I see no reason why article 5A should not be limited to matters of that kind. What is meant by "abuses" in the article is shown with reasonable clarity by paragraph (2), which refers to "abuses "which might result from the exercise of the exclusive rights "conferred by the patent, for example, failure to work."

Then great reliance is placed on the words "in any case." It is said that those words mean "in any case whatsoever," and that they, as it were, segregate paragraph (4) of the article from all its other provisions, and introduce a provision dealing with the grant of compulsory licences and the revocation of patents in any circumstances whatsoever, and in no way confined to cases of abuse of monopoly rights. I cannot accept that argument. In my view, the widest meaning that can be given to "in "any case" is "in any case of the kind dealt with by this "article." That construction seems to me to be necessary in order to give the article any coherent effect.

Then it is said that what is to be granted under paragraph (4) is "a compulsory licence," not "the compulsory licence," which one would expect if there was truly a reference back to compulsory licences of the kind mentioned in paragraph (3). In my view there is nothing in that point, and it is reasonably plain that the reference in paragraph (4) to "the grant of a compulsory "licence" is a reference back to a compulsory licence granted with a view to preventing abuse of monopoly rights.

Then it is sought to get over the significant phrase in paragraph (4), "if the patentee is unable to justify himself by "legitimate reasons" by saying that the words "justify himself "by legitimate reasons" do not suggest exculpation or the provision of some adequate excuse or, in the ordinary sense of the word, justification of some act or omission which might otherwise be considered worthy of blame. It is said that it can equally well refer to a patentee who has not done anything he ought not to have done, or omitted anything he ought to have done, but has simply obtained a patent relating to food or medicine. I cannot accept that argument. I think that the words "if "the patentee is unable to justify himself by legitimate reasons" strongly support the view that the whole of this article relates to measures to be taken to prevent an abuse of monopoly rights.

I think that the last sentence of paragraph (4) points to the same conclusion: "No proceedings for the revocation of a patent "may be instituted before the expiration of two years from the "date of the granting of the first compulsory licence." Clearly, the revocation there intended to be referred to is revocation on the ground of abuse, and that bears out the view that the reference to the first compulsory licence is a reference to a compulsory licence granted with a view to preventing abuse. Unless revocation is so limited in that paragraph as opposed to being considered as a reference to revocation of any kind on any ground and in any circumstances, it is difficult to see what effect should be given to it, for it cannot well be given a wholly unlimited meaning. If it were, one might find imported into article 5A a reference even to revocation of the kind provided for in section 32 of the Act of 1949, that is to say, revocation on the ground of invalidity, fraud, and so forth.

The point is one which is incapable of great elaboration, but reading article 5A of the Convention of 1934 as a whole, and giving the best consideration I can to the various indications as to its meaning to be extracted from the language used, it seems to me that it is reasonably plain that this article is referring simply to measures, whether by way of grant of compulsory licence or revocation, to prevent abuses of monopoly rights, and has no reference at all to the special provisions of the English legislation, under which a compulsory licence may be granted in respect of substances capable of being used as food or medicine. As I have said, those provisions were formerly contained in section 38A (2) of the Act of 1907 (introduced into that Act in 1919), and they are now to be found in section 41 of the Act of 1949.

The case turning, as in my view it does, on the true construction of the convention, little assistance on that question of construction can be derived from the Patents Act of 1949. It is, however, to be observed that section 37, which is the section under which compulsory licences can be granted by reason of what I will still refer to as abuses of monopoly rights, says that no application for a compulsory licence can be made until after the expiration of three years from the date of the sealing of a patent. That clearly reflects the provisions of article 5A of the convention. So, too, section 40, which provides for endorsements, etc., on the application of the Crown, provides that applications may be made at any time after the expiration of three years from the date of the sealing of the patent. Section 42, which enables patents to be revoked on the grounds specified in section 37, that is to say, for abuses of monopoly rights, provides that the application may be made at any time after the expiration of two years from the date of an order granting a compulsory licence under section 37. That again reflects the provisions of article 5A of the convention. Section 41, which, as I have said, is the present section relating to compulsory licences in respect of patents for substances capable of being used as food or medicine, contains no time limit. The inference, for what it is worth, seems to be that this Act was prepared on the footing that the convention imposed no provision as to time which was relevant to the granting of section 41 compulsory licences. For what it is worth, that circumstance fortifies me in the conclusion to which I have come.

It is, of course, true that section 45 (3) says: "No order shall be made in pursuance of any application under sections 37 to 42 "of this Act which would be at variance with any treaty, con-"vention, arrangement or engagement applying to the United "Kingdom and any convention country," and the inclusion of section 41 in that provision is the foundation of the appellants' case. But the appellants have also placed some reliance on this subsection as an aid to the construction of article 5A of the Convention of 1934, for it is said that, by the very inclusion in its terms of section 41, it suggests that the grant of a licence under section 41 might be at variance with the convention, and that if the reference to "any treaty, convention, arrangement or engagement" is to be treated as referring primarily to the existing Convention of 1934, it suggests in effect that section 41 is to be regarded as a section providing for the grant of compulsory licences within the meaning of article 5A of the convention. As to that argument, I would say that the expression in the Act (if there be such an expression) of an opinion to the effect that compulsory licences granted under section 41 would or might come within the terms of article 5A of the convention, cannot, in my view, affect the construction of article 5A. Further, I think that there was some force in what was said on the other side to the effect that subsection (3) of section 45 is satisfied if it is considered as referring not merely to any existing convention but to all such treaties, arrangements or engagements as may be made at any future time.

The argument for the appellants based on section 45 (3) is weakened by the circumstance that subsection (3) includes the whole fasciculus of sections 37 to 42, and that, as I have said, sections 37 and 40 and 42 are all framed so as to conform, as far as can be seen, with the requirements of article 5 of the convention, and yet the draftsman thought it necessary to include references to them in the provisions of subsection (3) of section 45. That suggests that subsection (3) of section 45 was inserted ex superabundanti cautela and not on account of any definite view taken as to the bearing of article 5A of the convention on those sections.

Therefore, for the reasons which my Lord has given, and for such reasons as I have been able to add, I am of opinion that the Divisional Court came to a right conclusion in this case and that the appeal fails and should be dismissed.

MORRIS L.J. I agree. It seems to me that the determination of this appeal depends on the interpretation and construction of article 5A of the Convention of 1934. The result of subsection (3) of section 45 of the Act of 1949 must be that the comptroller cannot make an order in pursuance of an application under section 41 which would be at variance with any convention applying to the United Kingdom. The only convention to which reference is made by the appellants is the Convention of 1934. It therefore becomes a question whether the Convention of 1934, when construed, has the result that the application pending before the comptroller should not be heard for the reason that it is an application that cannot be entertained.

The appellants do not contend that after the Convention of 1925 there was any time limitation imposed in regard to compulsory licences referable to food and medicine. It is not suggested that when Parliament legislated in 1928 they did not do so on appropriate lines. But the argument for the appellants is that in the Convention of 1934 a fundamental change was made by paragraph (4) of article 5A. It is said that the new language is clear, and that it is too strong to permit of any limitation. If that is so, it must be observed that the clarity and the strength of the language entirely eluded the legislature, and those who drafted a bill to submit to the legislature, for when in 1938 an Act was passed to give effect to the Convention of 1934 there was no time limit introduced referable to compulsory licences for food and medicine. On the appellants' submissions it therefore remained that from 1938 until 1949 the legislature, having set out to embody in English law the matters agreed by the convention, entirely failed to understand the language of the convention. If at a later date the full effect of the words had become apparent, I should have thought that in further legislation, and particularly in section 41 of the Act of 1949, there would have been some express reference to the time limitation. But these points cannot in any way affect the court in construing the article. The duty of the court is to be uninfluenced by any considerations such as those to which I have referred, and merely to construe the article.

The change that was introduced in 1934 was that the period of two years in reference to revocation was introduced. I read the first four clauses of article 5A exactly as Singleton L.J. has read them, and I agree fully with the way in which he has interpreted them. Paragraph (3) reads: "These measures "shall not provide for the revocation of the patent unless the "grant of compulsory licences is insufficient to prevent such "abuses." There is, therefore, a reference to compulsory licences and also to revocation, which are "measures," and those measures, it seems to me, are clearly measures to prevent abuses. When, therefore, paragraph (4) begins: "In any case, an "application for the grant of a compulsory licence may not be "made," I consider that the reference is to a compulsory licence of the same kind as the compulsory licence referred to in clause (3), that is to say, a compulsory licence which is a measure to prevent an abuse if the patentee is unable to justify himself. I am of the opinion that the opening words (which are only a translation of the French words) in their context mean: "In any case of the "kind contemplated by paragraphs (1), (2) and (3)," or that they might alternatively mean "however that may be." I fully agree with the way in which this matter has been dealt with by my Lords, and I express my concurrence with the judgments delivered.

Appeal dismissed.
Leave to appeal to House of Lords refused.

Solicitors: *Tackley, Fall & Read; Bristows, Cooke & Carpmael; Solicitor, Board of Trade.*

A. W. G.

HAVANT AND WATERLOO URBAN DISTRICT COUNCIL *v.* PAYNE AND ANOTHER.

C. A.
1953
Apr. 24.

Denning and Jenkins L.JJ. and Vaisey J.

Rates and Rating—Assessment—Rateable value—Sea defence rate—Imposed by local authority under private Act—Not a permissible deduction from gross value—Local authority not "a commissioner of "sewers or other like authority"—Rating and Valuation Act, 1925 (15 & 16 *Geo.* 5, *c.* 90), *s.* 22 (1) (*a*).

A local authority was empowered by a private Act of Parliament to build a sea wall and to recover the cost of the work from the owners of land within an area marked out by the Act by levying on them an annual sea defence rate. The local valuation court determined the assessment of a hereditament within the prescribed area and, in arriving at the rateable value, deducted from the gross value not only the statutory deduction under Sch. II to the Rating and Valuation Act, 1925, but also a sum representing the average annual amount of the sea defence rate payable by the owner of the hereditament. The local court's decision was confirmed by the Lands Tribunal, which held that the sea defence rate was "a "rate, charge or assessment" within the meaning of section 22 (1) (*a*) of the Rating and Valuation Act, 1925, and was therefore a legitimate deduction. On appeal by the local authority:—

Held, that a local authority were not "commissioners of sewers "or other like authority" within the meaning of the Rating and Valuation Act, 1925, since the words of the Act referred to ad hoc authorities entrusted by Parliament with specific tasks such as draining a district or controlling a catchment board, and did not include a local authority or a rating authority; and that, accordingly, in arriving at the rateable value of the hereditament, the

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[Reported by Mrs. E. M. WELLWOOD, Barrister-at-Law.]

C. A.

1953

Havant and Waterloo Urban District Council v. Payne.

amount of the sea defence rate imposed by the local authority could not be deducted from the gross value.

Decision of the Lands Tribunal reversed.

Appeal from the Lands Tribunal.

In 1947 the appellants, the Havant and Waterloo Urban District Council, were empowered by the Havant and Waterloo Urban District Council Act, a private Act, to build a sea wall to protect property on Hayling Island which, in 1945, had been flooded by the sea. The particular part of the island which was benefited by the wall was marked out by the Act. It was also enacted that the local authority should recover the cost of building the wall from the owners of the properties who were benefited by it by means of a sea defence rate, and there was a provision in the Act that if an owner of land wished to redeem the amount of the rate, he could do so by paying to the appellants, the urban district council, a capital sum. The sea wall was completed and the sea defence rate became payable.

On March 11, 1952, the local valuation court at Portsmouth determined the assessment of a hereditament consisting of a shop, house and premises known as Eastwards, Creek Road, Hayling Island, which was owned by the respondent, F. H. Plumstead. The gross value of the hereditament was assessed at £75 and the rateable value at £51. In arriving at the rateable value the court determined that there should be deducted from the gross value not only the statutory deduction of £15 under Sch. II to the Rating and Valuation Act, 1925, but also the sum of £9 representing the average annual amount of the sea defence rate payable by the owner under the Havant and Waterloo Urban District Council Act.

The council appealed against that decision to the Lands Tribunal, contending that the sum of £9 was not an amount which should be deducted from the gross value under section 22 (1) (*a*) of the Rating and Valuation Act, 1925.[1] The respondents, the valuation officer and the owner of the property, contended that it was a legitimate deduction. The Lands Tribunal held that the sea defence rate was a "rate, charge or assessment" within the meaning of section 22 (1) (*a*) of the Act which could be properly deducted, dismissed the council's appeal, and stated this case.

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[1] Rating and Valuation Act, 1925, s. 22: "(1) For the purposes of the "first new valuation list to be pre-"pared under this Act and of any "subsequent valuation list the rate-"able value of a hereditament shall "be ascertained as follows:—(*a*) If "the hereditament belongs to one of "the classes specified in the first "column of the table contained in "Part I of the Second Schedule to "this Act, there shall be deducted "from the gross value of the heredita-"ment an amount representing the "deduction specified with respect to "hereditaments of that class in the "second column of the said table, and "also, in the case of a hereditament "subject to any rate, charge, or "assessment made by any com-"missioners of sewers or other like "authority in respect of any drainage,

Michael Rowe Q.C. and *W. L. Roots* for the urban district council. The sea defence rate is not deductible in ascertaining the rateable value because it is not a "rate, charge or assessment "made by any commissioners of sewers or other like authority" and is therefore not exempted by section 22 (1) (*a*) of the Rating and Valuation Act, 1925.

By definition there must be an element of maintenance in a rate: see section 68 of the Act. The sea defence rate was not a maintenance rate but was merely designed to ensure the repayment of a capital sum with interest.

A rate must be imposed for public purposes and not, as here, for private improvement. The Havant and Waterloo Act was a private improvement Act passed to permit the construction of a sea wall to protect private property. Before the Act was passed the protection of that property was the responsibility of the property owners and Parliament specifically provided that the cost of constructing the wall should be transferred back to the owners. In construing section 22 (1) (*a*) of the Rating and Valuation Act regard must be had to the purpose of the private Act.

A local authority are not "commissioners of sewers or other "like authority." The urban district council existed for many purposes but it had been specifically authorized by the Act to carry out certain private work. Its position was therefore analogous to a local authority which was empowered to make roads under the Private Street Works Act and to recover the cost from the frontagers. The words "other like authority" in section 22 (1) (*a*) refer to catchment boards and other ad hoc authorities which are established by Parliament and endowed with specific functions.

Maurice Lyell for the valuation officer. This rate was properly deductible under section 22 (1) (*a*) of the Rating and Valuation

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"wall, embankment, or other work "for the benefit of the hereditament "(not being a usual tenant's rate), "such further amount as represents "the average annual amount of that "rate, charge, or assessment, and the "gross value as so reduced is in this "Act referred to as the net annual "value: . . ."

Act. Under the Land Drainage Act, 1861, commissioners of sewers were empowered to levy rates for the drainage of land and drainage of land included defence against water. That Act must have been in the contemplation of Parliament when the Rating and Valuation Act, 1925, was passed. The local authority was merely seeking to do under the private Act what a catchment board could do under the Land Drainage Act, 1930.

There is no dichotomy between a maintenance rate and a capital charge. It is reading words into section 22 (1) (*a*) to say that a rate may only be deducted if it is levied for maintenance purposes. It is fallacious to apply to section 22 (1) (*a*) the definition in section 68.

The opening words of the Havant and Waterloo Act, "Not-"withstanding anything contained in the Rating and Valuation "Act, 1925, . . ." are not intended to oust that Act. The words mean "notwithstanding the provisions of that Act the local "authority shall have power to make a rate and the owners shall "pay." The owners do pay the rate and it is fortuitous that a similar sum is returned to them by way of reduction in the rateable value.

Commissioners of sewers are entitled to raise rates for capital purposes and if the sea defence rate were imposed by them the same situation would result because any rate imposed by commissioners of sewers is a proper deduction.

A local authority is a public authority and it can be a drainage authority. Therefore it is a like authority to commissioners of sewers. "Like authority" merely means an authority carrying out the same kind of work as commissioners of sewers. If the sea wall had been constructed by a drainage authority, provided the work was for the benefit of a hereditament, the ratepayer would be entitled to the benefit of a reduction in the rateable value. The fact that Parliament permitted the local authority itself to carry out the work does not extinguish the right of the ratepayer to that benefit. The words "like authority" are sufficiently satisfied provided that the authority which carries out the work has the same sort of powers as commissioners of sewers, even though it may have other and wider powers.

J. P. Widgery for the ratepayer. The local authority is no worse off by the reduction in the rateable value because the construction of the sea wall has enhanced the gross value of the hereditament. If there is an element of absurdity arising by reason of the operation of section 22 (1) (*a*) it is because the rates have risen to 23s. in the pound. The same absurdity would arise whether the rate imposed under the private Act was a maintenance rate or a capital charge. [He adopted *Lyell's* arguments.]

Michael Rowe Q.C. in reply. The Rating and Valuation Act, 1925, brought rating authorities into being and there are references to rating authorities throughout the Act. It would be strange if in section 22 (1) (*a*) the rating authority itself were to be included in the words "other like authority." It is wrong to say, as submitted by the respondents, that a local authority is a like authority to commissioners of sewers because it carries out similar work. A local authority, even when carrying out private functions which it has been specifically authorized to do, remains the local authority. The word "authority" in section 22 (1) (*a*) means an authority which has been specifically established to carry out particular functions. Furthermore it must be an authority like the commissioners of sewers, which are essentially drainage authorities although they may do sea defence work. It would be wrong to say that the Havant and Waterloo Act conferred upon the urban district council the powers or functions of commissioners of sewers.

DENNING L.J. stated the facts and continued: The question for determination is what is the effect of the sea defence rate on the general rate leviable in the district. This is a test case. Eastwards, Creek Road, Hayling Island, is assessed at £75 gross value. If one deducts the ordinary percentage specified by the Rating and Valuation Act, 1925, the rateable value would be £60, but the ratepayer has to pay a sea defence rate of £9, and he contends that he is entitled to deduct that sum from the £60, making a rateable value of £51. The Urban District Council say that he is not entitled to deduct the £9.

In this district the general rate is 23s. in the £, and it is, therefore, greatly to the benefit of the ratepayer to have the amount reduced to £51. If he succeeds in his contention, it will mean that by paying a sea defence rate of £9 he will pay £10 7s. less on his general rate. Thus, on an ordinary rateable value of £60, he would have to pay £69, but on £51 he would have to pay only £58 13s. Even adding on the £9, that only makes £67 13. in all, so that he is £1 7s. in hand compared with other ratepayers. In short, he pays nothing for the sea wall and gets a bonus of £1 7s. at the expense of the other ratepayers. I need hardly say that that would appear to be contrary to the intention

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of Parliament when it passed the Havant and Waterloo Urban District Council Act of 1947, for it is clear that Parliament intended the owners of these benefited properties to pay for the sea wall.

The question depends on section 22 (1) (*a*) of the Rating and Valuation Act, 1925, which provides that in the case of certain hereditaments, of which this is one, " there shall be deducted " from the gross value of the hereditament an amount represent- " ing the deduction specified with respect to hereditaments of " that class "—in this case, £15 from £75, making £60—" and " also, in the case of a hereditament subject to any rate, charge, " or assessment made by any commissioners of sewers or other " like authority in respect of any drainage, wall, embankment, or " other work for the benefit of the hereditament (not being a " usual tenant's rate), such further amount as represents the " average annual amount of that rate, charge, or assessment. " . . ." It is said on behalf of the ratepayer that the sea defence rate of £9 is a rate made by " commissioners of sewers or other " like authority in respect of " a wall " for the benefit of the " hereditament " and that, therefore, it is to be deducted.

On the other hand, Mr. Michael Rowe, on behalf of the urban district council, has urged that, in ascertaining rateable value, the underlying principle is that the ratepayer can deduct maintenance charges, but not charges which are solely for capital improvement; and that this was a charge of a capital nature. He gives as an instance the case when a road is taken over by the local authority. The cost of making up the road has to be borne by the owners of adjoining property, but they are not allowed to deduct it from their rates. So here, he says, the owners of the benefited property should not be allowed to deduct what is really a capital charge.

I prefer to express no opinion on that point. I am content to decide this case on the narrow point that the urban district council are not " commissioners of sewers or other like authority " within the meaning of the Rating and Valuation Act, 1925. The words in the Act are not " or other authority "; they are " or " other *like* authority." In my judgment, those words do not include the rating authority itself or the local authority itself. They refer to ad hoc authorities, that is to say, authorities which are entrusted by Parliament with a specific task such as draining a district or controlling a catchment area, or something of that kind. An ad hoc authority often has to expend capital moneys, but it also has to maintain works for the benefit of its district; and the rate which it levies is much more for maintenance charges and interest charges than for capital repayment. It is quite understandable that such a rate should be deducted in order to ascertain rateable value. But this sea defence rate is not a rate of that kind. This urban district council is not an ad hoc authority at all; it is merely the local authority carrying on many activities in its district.

In my opinion, therefore, the sea defence rate cannot be deducted because it is not made by " commissioners of sewers " or other like authority." That is a sufficient ground for determining this appeal. Any other view would mean that the charge which Parliament, in passing the Act of 1947, clearly intended should fall upon the owners of these particular houses would, in effect, be transferred from the owners of those houses to all the rest of the ratepayers of the urban district and on the ratepayers of the whole county. The outside ratepayers would be subsidizing the owners of the benefited houses, whereas Parliament clearly contemplated that the owners of the houses who benefited should pay for the wall themselves.

There is one final point. If there is any conflict between the private Act and the public Act, the private Act should prevail. I am quite satisfied that the intention of Parliament in the private Act was that the sea defence rate should be paid by the owners, and that it should not be deducted in ascertaining the rateable value.

I would therefore allow the appeal.

JENKINS L.J. I agree that this appeal should be allowed. The short point is whether the sea defence rate is a " rate, charge " or assessment made by any commissioners of sewers or other " like authority in respect of any drainage, wall, embankment, or " other work for the benefit of the hereditament " within the meaning of section 22 (1) (*a*) of the Rating and Valuation Act, 1925.

It is to be observed that the same Act, in section 68, defines the expression " rate," and provides that the definition is not to include " any rate which is assessed under any commission of " sewers, or in respect of any drainage, wall, embankment, or " other work for the benefit of the land." That formula would extend to any rate assessed in respect of any of the matters

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referred to not only by any commissioners of sewers, but also by any other body whatsoever having the necessary lawful authority to make the rate.

The language of section 22 (1) (*a*) shows a significant difference, for there the deduction is allowed not simply in respect of "any rate, charge or assessment in respect of any drainage, wall, "embankment or other work," but only in respect of rates, charges or assessments of the descriptions mentioned which are made by "any commissioners of sewers or other like authority." Those words in the subsection limit the rates, charges and assessments which are deductible not merely by reference to the matters in respect of which they are made, but also by reference to the character of the authority by which they are made.

The question then, in the end, resolves itself into whether the urban district council in this case is an "other like "authority" within the meaning of section 22 (1) (*a*). In my view, the expression "other like authority" should not be construed as meaning any other body authorized to perform like statutory functions. In its primary significance, I do not think that the language is apt to convey that meaning. Moreover, if that was the meaning of the words "other like authority," the whole of the reference to "any commissioners of sewers or other "like authority" would in effect be otiose, for it would extend to any and every kind of body or authority which has the necessary legal power to make rates, charges or assessments of the descriptions mentioned. I think that the words "other like authority" mean a similar body authorized to make rates, charges or assessments of those descriptions. The body making the rate, charge or assessment must be an authority comparable in character to commissioners of sewers. In my view, it is impossible to say that the urban district council here complies with that requirement.

I should add that, as pointed out by Mr. Michael Rowe in reply, "commissioners of sewers or other like authority" would be a most remarkable expression to use if it was intended to include in that expression the local authority itself within whose area the hereditament to be valued is situate.

Accordingly, in the view which I take, the sea defence rate in this case is not a "rate, charge or assessment" which is deductible under the provisions of section 22 (1) (*a*), and on that ground, in my opinion, the appeal should be allowed.

VAISEY J. I have come to the same conclusion on the grounds already stated by my Lords. I am quite satisfied that the result accords with the plain sense and reason of the matter, and I agree that this appeal should succeed.

Appeal allowed.
Case remitted to the Lands Tribunal to issue a direction that the assessment of the net annual value of the property should be £60. Costs against the valuation officer.
Leave to appeal to the House of Lords refused.

Solicitors: *Lees & Co., agents for B. R. W. Gofton, Clerk to the Havant and Waterloo Urban District Council; Solicitor of Inland Revenue; Arthur S. Joseph & Cates, agents for MacDonald, Jacobs & Oates, Petersfield.*

BICKNELL v. BROSNAN.

1953
April 20, 24.

Lord Goddard C.J., Lynskey and Parker JJ.

National Service—Ireland—Applicability of English statutes passed before 1949 *to citizens of Republic of Ireland—Liability of Irish citizens to national service if ordinarily resident in the United Kingdom—Temporary residence—National Service Act*, 1948 (11 *&* 12 *Geo.* 6, *c.* 64), *s.* 34 (4)*—British Nationality Act*, 1948 (11 *&* 12 *Geo.* 6, *c.* 56), *s.* 3 (2)*—Ireland Act*, 1949 (12 *&* 13 *Geo.* 6, *c.* 41), *s.* 3 (1), (2).

The combined effect of section 3 (2) of the British Nationality Act, 1948, and section 3 (1) of the Ireland Act, 1949, is to render applicable to citizens of the Republic of Ireland the provisions of the National Service Act, 1948, which came into force on the same day as the British Nationality Act, 1948. Accordingly a citizen of the Republic of Ireland of the appropriate age and not in one of the excepted classes who is ordinarily resident in this country within the meaning of section 34 (4) of the National Service Act, 1948, is liable to be called upon to serve in the armed forces of the Crown.

Semble, that the combined effect of section 3 (1) and (2) of the Ireland Act, 1949, and section 34 (4) (*c*) of the National Service

[Reported by Miss C. J. ELLIS, Barrister-at-Law.]

Act, 1948, is that a citizen of the Republic of Ireland who has been resident in Great Britain for less than two years is not to be regarded as ordinarily resident here.

CASE STATED by Bristol justices.

The prosecutor, Oscar Dunford Bicknell, preferred an information against Patrick Brosnan, charging him with, being a person subject to registration under the National Service Act, 1948, having failed to comply with the requirements of a written notice in the prescribed form duly served on him requiring him to submit himself to medical examination on October 10, 1952, by a medical board, contrary to section 8 (4) of the National Service Act, 1948.

At the hearing of the information the following facts were proved or admitted.—The defendant was born on February 25, 1931, at Tralee, County Kerry, in the territory of what was then the Irish Free State and is now the Republic of Ireland. He lived in Ireland until May, 1949, when he came to England and obtained employment as a builders' labourer. Apart from one month's holiday in Ireland he had resided continuously in England since May, 1949. The defendant intended, eventually, to return to Ireland and make his permanent home there, but it was impossible to determine with any degree of certainty when he would do so. On September 26, 1952, the Minister of Labour and National Service caused to be served on the defendant a written notice in the prescribed form requiring him to submit himself to medical examination by a medical board on October 10, 1952. The defendant received the notice, to which he replied by letter dated September 27, 1952, in which he said: "The "enclosed papers are no concern of mine. I am an Irish citizen "therefore you have no claim on me, which means no medical "exam." The defendant failed to present himself for the medical examination on October 10 or on any other date.

The justices were of opinion that the defendant was not a British subject and dismissed the information.

The prosecutor appealed.

Sir Reginald Manningham-Buller S.-G. and *S. B. R. Cooke* for the prosecutor. This appeal raises an important question regarding the liability of the citizens of the Republic of Ireland for national service. The question comes to this: Was the defendant, on the date of the service of the notice to submit himself to medical examination, within the scope of section 1 of the National

Service Act, 1948[1]? Section 3 (2) of the British Nationality Act, 1948,[2] resolves the question. The National Service Act received the Royal Assent on July 30, 1948, the same day as the British Nationality Act; it came into force on the same day, namely, January 1, 1949. Accordingly the National Service Act comes within the provisions of section 3 (2), with the result that it continues to have effect on citizens of Eire who are not British citizens in like manner as it does on British subjects. Section 3 (2) is obviously a subsection intended to make clear what Acts apply to citizens of Eire. The position before the British Nationality Act was that the National Service Acts did apply to those who lived in Eire: *Murray* v. *Parkes*.[3] The British Nationality Act preserves their liability. The Act is not making any change in the law to their advantage, nor any change to their disadvantage. It is merely preserving the status quo.

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[1] National Service Act, 1948, s. 1: "Subject to the provisions of this "Part of this Act, every male British "subject ordinarily resident in Great "Britain who has attained the age of "eighteen years and has not attained "the age of twenty-six years and is "not a person mentioned in the First "Schedule to this Act shall be liable "to be called upon to serve in the "armed forces of the Crown. . . ."

S. 34 (4): "For the purposes of "this Part of this Act, a person who "is resident in Great Britain shall "be deemed to be ordinarily resident "there unless—(*a*) he is residing there "only for the purposes of attending "a course of education; or (*b*) the "circumstances of his residence in "Great Britain are otherwise such as "to show that he is residing there "for a temporary purpose only; or "(*c*) being a person who is, under the "provisions of any Act in force in any "part of His Majesty's dominions "outside Great Britain, a national or "citizen of that part within the "meaning of that Act, or a person "who was born or is domiciled in "any such part of His Majesty's "dominions . . . or any other country "or territory being a country or terri-"tory under His Majesty's protection ". . . he has been resident in Great "Britain for less than two years."

[2] British Nationality Act, 1948, s. 3 (2): "Subject to the provisions "of this section, any law in force in "any part of the United Kingdom "and Colonies or in any protectorate "or United Kingdom trust territory "at the date of the commencement "of this Act, whether by virtue of a "rule of law or of an Act of Parlia-"ment or any other enactment or "instrument whatsoever, and any "law which by virtue of any Act of "Parliament passed before that date "comes into force in any such place "as aforesaid on or after that date, "shall, until provision to the contrary "is made by the authority having "power to alter that law, continue to "have effect in relation to citizens of "Eire who are not British subjects "in like manner as it has effect in "relation to British subjects."

Ireland Act, 1949, s. 3 (1): "It "is hereby declared that—(*a*) the "operation of the following statutory "provisions, that is to say—(i) the "British Nationality Act, 1948 (and "in particular, and without prejudice "to the generality of the preceding "words, sections 2, 3 and 6 thereof); ". . . is not affected by the fact that "the Republic of Ireland is not part "of His Majesty's dominions; and "(*b*) that, in the said provisions, and "in any Act of Parliament . . . so "far as it operates as part of the law "of, or of any part of, the United "Kingdom . . . references to citizens "of Eire include, on their true con-"struction, references to citizens of "the Republic of Ireland."

[3] [1942] 2 K.B. 123; 58 T.L.R. 231; [1942] 1 All E.R. 558.

[Parker J. The words in the section are apt to prevent disability; are they apt to impose liability?]

There is nothing in section 3 (2) to show that it is only for a limited purpose. There is no reason why the subsection should be limited to laws preventing disabilities and not apply to those imposing obligations.

[Lord Goddard C.J. Your argument is that section 1 of the National Service Act is amended by the British Nationality Act. It seems incredible that Parliament did not mention the National Service Act by name.]

Parliament could not refer to the National Service Act, 1948, in the British Nationality Act, because it was not in force at the time when the latter Act was passed; Parliament could not refer to the Bill because a Bill has no statutory authority.

G. A. Forrest for the defendant. Section 3 (2) was intended to smooth over the transition period and not to impose obligations on the citizens of Eire. Had it been intended to impose such a liability on them it would not have been done by inserting words in the middle of a section. Whatever may be the meaning of section 3, the intention is that the section is a piece of enabling machinery; it may be to preserve the status quo; it may be to right the position under section 2 of the Act, which appears to take away from the citizens of Eire their British nationality unless they make the claim prescribed. The legislature realized that section 2 would make Irish citizens liable to the disabilities of aliens, and accordingly passed section 3 to allow them to remain here without incurring the disabilities which they would have incurred as aliens.

Sir Reginald Manningham-Buller S.-G. replied.

Cur. adv. vult.

April 24. Lord Goddard C.J., reading the judgment of the court, stated the facts and continued:—The material sections which we have to consider are, first, section 1 of the National Service Act, 1948, which provides that every male British subject ordinarily resident in Great Britain between the ages of 18 and 26, subject to certain excepted classes which are immaterial for the purposes of this case, shall be liable to be called on to serve in the armed forces of the Crown, and the Act contains consequential provisions for the registration of people liable for service and for their medical examination. [His Lordship referred to section 34 (4) (*a*) and (*b*) of the National Service Act and continued:] As the justices held that the defendant was not a British subject they did not find it necessary to determine the question whether his residence was only temporary, and we shall dispose of this point at once. On the evidence it is impossible to hold that he is a mere temporary resident. Clearly a temporary resident for this purpose means a person who is paying a visit, whether for social or business purposes, and merely making a short stay. This is emphasized by the fact that a person resident for the purposes of attending a course of education, which might easily last three or four years, is specially exempted by the Act. The defendant is in fact here for an indefinite period, and the fact that he intends to return at some unspecified date so that he retains his Irish domicile does not make him a temporary resident within the meaning of that part of the section.

We have, therefore, to consider whether for the purposes of this Act he is to be regarded as a British subject or, at any rate, liable to be called on for service, and the material sections which we have now to consider are contained in the British Nationality Act, 1948. That Act and the National Service Act were both passed on July 30, 1948, and both came into force on January 1, 1949, and it is material to observe that up to that time Irish citizens ordinarily resident in this country were liable to the provisions of the Acts then relating to national service. By section 1 of the British Nationality Act, 1948, every person who under this Act is a citizen of the United Kingdom and colonies, or who under any enactment for the time being in force in any country mentioned in subsection (3) of this section, which are the countries commonly referred to as the Dominions, is a citizen of that country shall by virtue of that citizenship have the status of a British subject. Eire is not mentioned in that section. By section 2 citizens of Eire who were immediately before the commencement of the Act British subjects were given an option to remain British subjects provided they satisfied certain conditions. [His Lordship read section 3 (2) and continued:] The only construction that the court can put on this subsection is that the whole of the English law, whether common law or statute, in force at the date of the commencement of the Act is applied to citizens of Eire in like manner as it applies to British subjects, and the statute law applied to them includes any law passed before the commencement of the Act but which comes into force on or after that date which, as we have already said, is January 1, 1949. As by the terms of that section the law, whether common law or statute, in force at that date is to continue to have effect with relation to citizens of Eire who were not British subjects in like manner as it has effect in relation to British subjects, it seems to us that that must mean that citizens of Eire are to be treated for the purposes of such Acts in exactly the same way as though they were British subjects.

It may at first sight seem that the subsection is a somewhat obscure method of applying the National Service Act to citizens of Eire ordinarily resident in this country, but, as the Solicitor-General in the course of his careful argument pointed out, as the two Acts were passing through Parliament together it would have been difficult and contrary to Parliamentary practice to apply expressly the provisions of the British Nationality Act while still only a Bill to the National Service Act which was also only a Bill and not law at the time when the former Act was passing through Parliament. But whatever the reason, it appears to us that, applying the ordinary canons of construction to section 3 (2), which require a court to give the plain grammatical meaning to the words used, it is impossible to hold that the provisions of an Act, which had been passed before the British Nationality Act and which came into force on the same day as that Act, are not effective so as to make a citizen of Eire ordinarily resident here, and not within the excepted classes mentioned in Sch. I to the National Service Act, liable to its provisions.

It is unnecessary for the purposes of this judgment to consider subsection (1) of section 3 of the British Nationality Act, as it would not appear to have any application to the facts of this case, but we would add that, as the National Service Act, 1948, is a consolidating Act, if it were intended to exempt persons hitherto liable for service, as the citizens of Eire were at the time of its passing, one would expect to find that they were exempted by clear words. The Ireland Act, 1949, by section 1, provides that that part of Ireland theretofore known as Eire is to be referred to thereafter as the Republic of Ireland. [His Lordship referred to the special provisions in section 3 (1) of the Ireland Act and continued:] It is enough to say that the effect of section 3 (1) and (2) of that Act coupled with section 34 (4) (*c*) of the National Service Act seems to be that if a citizen of the Republic of Ireland has been resident in Great Britain for less than two years he is not to be regarded as ordinarily resident here, but as the defendant has been resident here since 1949 it follows that he is to be regarded as an ordinary resident. The effect of the various statutory provisions to which we have referred is that a national or citizen of the Republic of Ireland who is ordinarily resident in Great Britain, of the appropriate age and not in one of the excepted classes, is subject to the National Service Act, and accordingly we allow this appeal with costs and send the case back to the justices with a direction to convict.

Appeal allowed.

Solicitors: *Solicitor, Ministry of Labour and National Service; Pengelly & Co. for J. W. Ward & Son, Bristol.*

REGINA *v.* MINISTER OF HOUSING AND LOCAL GOVERNMENT. *Ex parte* CORPORATION OF LONDON.

1953
Apr. 28, 29.

Lord Goddard C.J., Lynskey and Parker JJ.

Town and Country Planning—Purchase notice—"Owner" of land—Notice by freeholder not entitled to rack rent—Duty of Minister—Town and Country Planning Act, 1947 (10 *&* 11 *Geo.* 6, *c.* 51), *ss.* 19 (1), 119 (1).

The Corporation of London were the assignees of a lease of 1925 for 75 years from September 29, 1924, at a ground rent of £750 a year of premises which, due to bomb damage, had in 1941 become a derelict site. In March, 1952, the trustees of the late owner of the freehold applied to the corporation as local planning authority for permission to develop the site, but the corporation, who proposed to incorporate the site in a road-widening scheme, refused permission. In September, 1952, the trustees purported to serve a notice on the corporation under section 19 (1) of the Town and Country Planning Act, 1947, requiring the corporation to purchase their interest in the land. The corporation forthwith transmitted a copy of the notice to the Minister, at the same time expressing the view that the trustees as freeholders of the site in respect of which there was a leasehold interest were not "owners" within section 19 (1) and, therefore, had no power to serve a purchase notice. The Minister, being of the opinion that he was not concerned with the question of ownership, but that his duties were confined to considering whether the conditions mentioned in section 19 (1) (*a*)–(*c*) were fulfilled, made an order confirming the notice. On a motion by the corporation for an order of certiorari to quash the Minister's order:—

Held, that the word "owner" in section 19 (1) had the same meaning as that contained in section 119 (1) of the Act; that by the lease of 1925 the land was not let to the corporation at a rack rent; that the trustees, having parted with possession of the land until 1999, had no power to let or collect rent in respect of the premises and so were not persons who would have been entitled to receive the rack rent if it had been let at a rack rent; that accordingly they were not owners entitled to give the purchase notice under section 19 (1); and that, therefore, the notice was a nullity.

Per curiam: The jurisdiction of the Minister to confirm the purchase notice having been challenged, it was for him to satisfy himself by making the necessary inquiries that he had jurisdiction.

APPLICATION for orders of certiorari and mandamus.

The application was made by the Corporation of London in respect of a decision dated December 31, 1952, made by the Minister of Housing and Local Government pursuant to the Town and Country Planning Act, 1947, purporting to confirm a purchase notice purported to be served under section 19[1] of the Act in respect of the fee simple of the site of No. 69 Ludgate Hill, in the City of London, the notice being given by or on behalf of the trustees of the real estate of Alexander Jones, deceased.

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[1] Town and Country Planning Act, 1947, s. 19: "(1) Where permission to develop any land is refused, "whether by the local planning "authority or by the Minister, on an "application in that behalf made "under this Part of this Act, or is "granted by that authority or by the "Minister subject to conditions, then "if any owner of the land claims— "(a) that the land has become incapable of reasonably beneficial use in "its existing state; and (b) in a case "where permission to develop the "land was granted as aforesaid "subject to conditions, that the land "cannot be rendered capable of "reasonably beneficial use by the "carrying out of the permitted "development in accordance with "those conditions; (c) in any case, "that the land cannot be rendered "capable of reasonably beneficial use "by the carrying out of any other "development for which permission "has been or is deemed to be granted "under this Part of this Act, or for "which the local planning authority "or the Minister have undertaken to "grant such permission, he may, "within the time and in the manner "prescribed by regulations made "under this Act, serve on the council "of the county borough or county "district in which the land is situated "a notice (hereinafter referred to as "a 'purchase notice') requiring that "council to purchase his interest in "the land in accordance with the provisions of this section. (2) Where "a purchase notice is served on any "council under this section, that "council shall forthwith transmit a "copy of the notice to the Minister, "and subject to the following provisions of this section the Minister "shall, if he is satisfied that the "conditions specified in paragraphs "(a) to (c) of the foregoing subsection "are fulfilled, confirm the notice, and "thereupon the council shall be "deemed to be authorized to acquire "the interest of the owner compulsorily in accordance with the provisions of Part IV of this Act, and "to have served a notice to treat in "respect thereof on such date as the "Minister may direct. . . . (3) If "within the period of six months "from the date on which a purchase "notice is served under this section the "Minister has neither confirmed the "notice nor taken any such other "action as is mentioned in paragraph "(a) or paragraph (b) of the last foregoing subsection, nor notified the "owner by whom the notice was "served that he does not propose to "confirm the notice, the notice shall "be deemed to be confirmed at the "expiration of that period, and the "council on whom the notice was

On September 29, 1873, the Commissioners of Sewers of the City of London, who were then owners of the premises, leased the premises to one T. Treloar for 80 years at a rent of £350 per annum. Subsequently the Commissioners transferred their reversion in the freehold to Alexander Jones. On May 23, 1922, the representatives of T. Treloar made an underlease of the premises to the partners of the firm of Treloar & Sons, at a rental of £1,136 per annum, expiring on September 22, 1952. On October 2, 1924, this underlease was assigned to E. B. Williamson and C. M. Walker. On June 23, 1925, the trustees of Alexander Jones granted a lease to E. B. Williamson and C. M. Walker for a period of 75 years from September 29, 1924, at a rental of £750 per annum, the lease being subject to, but with the benefit of, the lease of 1873. On February 19, 1940, the underlease of 1922 was assigned to Hampton & Sons Ld., and they were also granted a land certificate in respect of the lease of 1925. On April 8, 1942, Hampton & Sons Ld. acquired the residue of term of the lease granted in 1873.

In 1940 and 1941 the premises were damaged by enemy action to such an extent as completely to destroy the buildings on the land. Thereafter, the site was left derelict as a bombed site. Messrs. Hampton & Sons Ld. served a retention notice on the trustees under the Landlord and Tenant (War Damage) Act, 1939, and on February 9, 1950, they gave notice asking for permission to develop the site, but were refused permission by the Corporation of London as the town planning authority. The reason for the refusal was: "That the proposed development "would prejudice the new layout of the area of extensive war "damage in which the site is situated, including the provision "of a roundabout at the junction of Ludgate Hill, New Bridge "Street, Fleet Street, and Farringdon Street." On August 17, 1950, Hampton & Sons Ld. served a notice under section 19 (1)

"served shall be deemed to be "authorized to acquire the interest of "the owner compulsorily in accordance with the provisions of Part IV "of this Act, and to have served "notice to treat in respect thereof at "the expiration of the said period."

S. 119 (1): "In this Act except so "far as the contrary is provided or "the context otherwise requires . . . "'owner,' in relation to any land, "means . . . a person . . . who, "whether in his own right or as trustee or agent for any other person, "is entitled to receive the rack rent "of the land or, where the land is "not let at a rack rent, would be so "entitled if it were so let. . . ."

of the Act of 1947 requiring the corporation to purchase their interest in the land at 69 Ludgate Hill.

The corporation, as required by section 19 (2), sent a copy of the notice to the Minister, and taking the view that Hampton & Sons Ld. were the owners within the Act, and that the Minister was bound to grant his certificate confirming the notice because of the existing state of the land, took no steps to be heard in opposition to the application to confirm the notice. By notice dated November 9, 1950, the Minister confirmed the notice, and the sum of £71,250 was paid by the corporation to Hampton & Sons Ld. for their leasehold interest in the premises. That interest was assigned to the corporation; the title of the corporation was duly registered at the Land Registry and a certificate issued.

On March 24, 1952, the trustees of Alexander Jones applied for permission to develop the site, but were told by the planning officer of the corporation that planning permission for redevelopment "has already been refused in respect of the interest of "the owner within the meaning of section 19 of the Town and "Country Planning Act." They then appealed to the Minister, who disallowed their appeal and refused his permission for development of the land. On September 1, 1952, the trustees purported to serve on the corporation under section 19 (1) of the Act a notice requiring the corporation to purchase their interest in the land, that was to say, the fee simple. On September 3 the corporation transmitted a copy of the notice to the Minister, who gave the parties an opportunity of being heard upon the application. The corporation, in exercising their right to be heard, wrote to the Minister stating that, "As the "corporation contends that the servers of the purchase notice, "being the freeholders of the above site in respect of which "there is a leasehold interest which is vested in the corporation, "are not persons who may serve a purchase notice under "section 19 of the Town and Country Planning Act, 1947, the "corporation desires an opportunity of being heard by a person "appointed by the Minister for this purpose."

On December 31, 1952, after the hearing had taken place, the Minister notified his decision as follows: "The Minister "accepts the view put forward by the trustees that he is not "concerned with the question of ownership and that his duties "in relation to the notice are confined to considering the conditions mentioned in paras. (*a*) to (*c*) of subsection (1) and "whether they are fulfilled in relation to the land. He is "satisfied that they are fulfilled and it appears to him that "he has no discretion to refuse to confirm the notice: he must, "he is advised, proceed under subsection (2) if the notice is "not withdrawn. His confirmation in these circumstances does "not, of course, import any decision as to whether the servers "of the notice are owners entitled to serve such a notice or "not."

The corporation moved for an order of certiorari to quash that order on the ground that the trustees as the servers of the notice were not the owners of the land within the meaning of section 119 (1) or section 19 (1) of the Act. Alternatively, they moved for an order of mandamus directing the Minister to hear and determine the matter according to law.

Harold B. Williams Q.C. and *Derek Walker-Smith* for the corporation. The question is whether the trustees are owners of the land within the definition in section 119 (1) of the Act of 1947, so as to be capable of serving the purchase notice under section 19 (1). It is submitted that the trustees were not the owners and, therefore, that the Minister had no jurisdiction to confirm the notice served by them.

It is true that the definition of "owner" in section 119 (1) is said to apply unless the context otherwise requires, but there is nothing in section 19 (1) which would require the adoption of any other meaning. It is conceded that "owner" in ordinary language is apt to describe the freeholder of property, but in this case the word is used in relation to rack rent, which is described by Blackstone as the full annual value of the tenement or something near it: see also *Rawlance* v. *Croydon Corporation.*[2]

In determining whether the premises were let at a rack rent one has to consider the position at the date when the lease was entered into and not, as is suggested by the trustees, at the date when the purchase notice was served: *Borthwick-Norton* v. *Collier.*[3] Both the £350 under the lease of 1873 and the £750 under the 1925 lease were ground rents, the rack rent being at least the £1,136 payable by the underlease of 1922; therefore, at no time under any of the documents which subsisted up to the time that the corporation acquired their interest in the land were the trustees in receipt of the rack rent.

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[2] [1952] 2 Q.B. 803; [1952] 2 T.L.R. 460; [1952] 2 All E.R. 535.

[3] [1950] 2 K.B. 594; 66 T.L.R. (Pt. 2) 131; [1950] 2 All E.R. 204.

[LORD GODDARD C.J. If that is right does it mean that the trustees get nothing?]

They will ultimately receive the freehold value of the land when it is acquired by the corporation and that depends on when it becomes feasible to carry out the improvement.

The position as far as the trustees are concerned is the same as if someone who had no interest in the property had served the notice. When one comes to the second limb of the definition in section 119 (1), the person who would be in receipt of the rack rent must be a person entitled to give physical possession of the premises. The trustees have never been in such a position since they first took the freehold from the Commissioners of Sewers, and they are not now.

If that is right the Minister had no jurisdiction to confirm the notice and the notice is a nullity. [Counsel also referred to *Ealing Borough Council* v. *Minister of Housing and Local Government*.[4]]

Heathcote-Williams Q.C. and *R. E. Megarry* for the trustees. " Owner " in section 19 (1) has the ordinary meaning of a person in whom an interest in land is vested. The contrast between the definition in section 119 (1) and the use of the word in section 19 (1) is that the latter section is dealing with land which has been sterilized, whereas section 119 (1) is dealing with land which is either let at a rack rent or could be so let.

The argument is put in two ways. First, that in the circumstances at the material time there was no owner within section 119 (1), and that exemplifies the fact that that section does not apply to section 19 (1). If only one owner was contemplated for the purposes of section 19 (1), the use of the word " any " was inappropriate and the section would have said " the owner of the " land." It is not suggested that an owner within section 119 (1) could not also be an owner for the purposes of section 19 (1), but it is submitted that the word as used in section 19 (1) is not restricted to a particular owner but extends to any person interested. Any other construction would lead to absurdity and injustice. For example, if premises were let at a rack rent by a lease expiring in 1960, and in 1940 the premises were destroyed by enemy action and a notice of retention was served under the Landlord and Tenant (War Damage) Act, 1939, by virtue of section 10 (1) of that Act the tenant is under an obligation to render the premises fit as soon as reasonably practicable, but in the meantime no rent is payable. If the tenant then applied for town planning permission and was refused, the position would be that, although the premises were let at a rack rent, the landlord would not be entitled to receive that rent until the premises were rendered fit, which, owing to the refusal of planning permission, the tenant could not do. The result would be that the landlord would be kept out of his rent for ever, and, therefore, not being a person entitled to receive the rack rent, he would not be the "owner" within section 119 (1). But it is submitted that section 19 (1) is contemplating that where the land which, by virtue of the refusal of town planning permission, has been rendered sterile, the section comes to the aid of any persons having an interest in the land who can call upon the planning authority to acquire their respective interests.

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[4] [1952] 1 Ch. 856; [1952] 2 T.L.R. 490; [1952] 2 All E.R. 639.

[PARKER J. You read it as "Any person having any interest in the land."]

Yes, that is consistent with the ordinary understanding of justice. The two sections are reconcilable because in section 119 (1) the opening words are "except so far as . . . the context "otherwise requires." Here the context did require a different interpretation. [Counsel referred to Maxwell on Interpretation of Statutes, 10th ed., p. 31; *Sherwood* v. *Moody*[5]; *Lawes* v. *Caulcutt.*[6]]

The second way in which the argument is put is that if, contrary to the first submission, section 119 (1) does apply to section 19 (1), then on the material date, namely, the date of the service of the purchase notice, the trustees were the owners within the former section because £750 a year was the maximum rent obtainable for this bare site subject to planning refusal. The corporation having conceded that the land was going to be made into a road there was no question of it being let at any higher figure. [Counsel referred to *Lambeth Overseers* v. *London County Council*[7]; *London County Council* v. *Wandsworth Borough Council.*[8]]

It is submitted that on either ground the trustees were entitled to serve the purchase notice, the Minister was right in confirming it, and, therefore, no question of jurisdiction arises.

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[5] [1952] 1 T.L.R. 450; [1952] 1 All E.R. 389.

[6] [1952] 2 Q.B. 834; [1952] 1 T.L.R. 757; [1952] 1 All E.R. 748.

[7] [1897] A.C. 625; 13 T.L.R. 527.

[8] [1903] 1 K.B. 797; 19 T.L.R. 372.

J. P. Ashworth for the Minister. " Owner " in section 19 (1) has the meaning given to it by section 119 (1) and does not mean a person who has any interest in land. That that is so is shown by consideration of sections 26 and 27 of the Act, where reference is made to " any person " and shows that the Act is distinguishing between an owner and any other person.

As to the Minister's jurisdiction to confirm the purchase notice, whether or not the person serving the notice is the owner within section 119 (1) is not a matter for the Minister to decide. If the notice was invalid it was for the corporation to refuse to transmit it to the Minister, but, having transmitted it, section 19 (2) only required him to satisfy himself that the conditions in paras. (*a*) to (*c*) were fulfilled. [Counsel referred to *Brierley Hill Local Board* v. *Pearsall* [9]; *Ealing Borough Council* v. *Minister of Housing and Local Government.*[10]] Although certiorari would lie if it turned out that the notice was a nullity, the validity of the notice was not a matter for the Minister to inquire into; he could not summon before him any other interested parties, but must take the notice at its face value.

[Lord Goddard C.J. The notice will become binding in six months if it is not challenged.]

Not if it is a nullity. The corporation directly they received the notice should have said: " We are not obliged to transmit " this and, if you want to compel us to do so, prove that you are " the owners." The obligation to transmit the notice only applies if it is valid.

Lynskey J. [having stated the facts]: It was contended on behalf of the trustees that the definition of " owner " in section 119 (1) was not to be applied to that word when used in section 19 (1), and in particular that the use of the word " any " before the word " owner " in the latter section indicated that the context required a different interpretation of the word " owner " from that given in section 119 (1). For myself, I do not think that the context of section 19 (1) does require any different interpretation. In fact, when one looks at sections 26 and 27 of the Act, it seems fairly clear that the Act is distinguishing between an owner and other persons having other interests, and the effect of the interpretation section is to make it clear who is the owner of the land for the purposes of applying the provisions of section 19 (1) apart from other sections of the Act. The question then arises whether one can describe the trustees as being owners having regard to those words of interpretation: "'Owner,' in relation to any land, means . . . a "person . . . who, whether in his own right or as trustee or "agent for any other person, is entitled to receive the rack "rent of the land or, where the land is not let at a rack rent, "would be so entitled if it were so let. . . ."

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[9] (1884) 9 App.Cas. 595.

[10] [1952] 1 Ch. 856.

The first point to be considered is: Was this land at the material time let at a rack rent? Two possibilities have been envisaged. First, it is suggested that the lease of 1925 was a letting at a rack rent, and as the premises are still let under that lease, the trustees are persons entitled under the terms of that lease to receive the rack rent. But when one looks at the position in 1922, when these premises were let at £1,136 to an occupying tenant, it is impossible to say that a rental in 1925 of £750 a year was anything more than a type of ground rent, and in fact, although the argument was suggested by Mr. Heathcote-Williams, I do not think that it was stressed with any great vigour. On the other hand, it is said that the trustees would be entitled to the rack rent if the premises were let. It is said that at present they are derelict premises and, but for the provisions of the Landlord and Tenant (War Damage) Act, 1939, the trustees would be entitled to £750 a year, and that, this being a derelict site, that figure would represent a rack rent. That proposition, however, presupposes that the trustees are in a position to let the premises and to receive rent. But their position today is that they are not entitled either to enter on the land or to allow anybody else to do so. They have parted with their possession of the land until 1999. They have no power to let or to collect rent in respect of the premises and, in my view, therefore, it cannot be said that they are persons who, if the land were let at a rack rent, would be entitled to receive it. The person so entitled if the premises were let at a rack rent would be the Corporation of London as the persons entitled to occupy under their lease of 1925.

The result is that the trustees are not owners as defined in section 119 (1), and, therefore, were not persons who were entitled to give the notice under section 19 (1), and the notice was a nullity. The result is that the Minister had no jurisdiction to make an order confirming the notice that was given, and his order doing so must be brought up and quashed.

1953

REGINA *v.* MINISTER OF HOUSING AND LOCAL GOVERNMENT. *Ex parte* CORPORATION OF LONDON.

Lynskey J.

It was submitted on behalf of the corporation as one of their grounds for asking this court to quash the confirmation, that the Minister refused to inquire whether the persons serving the notice were owners or not. It seems to me that, the jurisdiction of the Minister to make the order having been challenged, it fell upon him to satisfy himself by making the necessary inquiries that he had jurisdiction to deal with the matter. Whether he ought to make inquiries in every case is another matter, and, for myself, I do not propose to lay down any general rule, but only to deal with the facts I have before me.

LORD GODDARD C.J. I agree.

PARKER J. I also agree.

Application granted.

Solicitors: *Comptroller and City Solicitor; Solicitor, Ministry of Health and Ministry of Housing and Local Government; Boxall & Boxall.*

J. D. P.

1953
May 20, 21.

Slade J.

STOTT *v.* SIR WILLIAM ARROL & CO. LD.

[1951 S. No. 2392.]

Damages—Personal injuries—Special damage—Loss of wages—Right to take account of benefits accruing after period of incapacity—Law Reform (Personal Injuries) Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 41), *s.* 2 (1).

In an action for damages for personal injuries it was admitted that the plaintiff had been incapacitated during a period of some five weeks, which, after the deduction of industrial injury benefit, resulted in a net loss of earnings of £41 6s. 9d. After returning to work and during a period when he suffered no loss of wages the plaintiff received disablement benefit amounting to £126 13s.:—

Held that, on the true construction of section 2 (1) of the Law Reform (Personal Injuries) Act, 1948, one half of the benefit to be taken into account against the loss of earnings was not to be restricted to the period during which the loss was suffered, and the court was entitled in its discretion to take into account rights which had accrued after that period so as to reduce or, as in the present case, to extinguish the loss of earnings suffered.

ACTION.

The plaintiff, who was a steel erector employed by the defendants, claimed damages for injuries suffered when a stack of steel staunchions was knocked over by a rotating crane, and one of the staunchions fell on the plaintiff's leg.

The plaintiff was incapacitated for five weeks during November and December, 1949, suffering a loss of wages amounting to £47 15s. 6d. During the period of incapacity he received industrial injury benefit amounting to £12 17s. 6d. On returning to work he was employed on the same job at his pre-accident wage, and in addition received disablement benefit amounting to £126 13s.

Slade J. held that the defendants were negligent and awarded the plaintiff £450 general damages. In regard to special damage, the defendants contended that, on the true construction of section 2 (1) of the Law Reform (Personal Injuries) Act, 1948,[1] not only should half the benefit received by the plaintiff during incapacity be taken into account against the loss of earnings, but also half the benefit received after the plaintiff had returned to work to the extent of extinguishing the loss. The plaintiff contended that the operation of section 2 (1) was confined to the value of rights which had accrued during the period of incapacity.

F. D. McIntyre for the plaintiff.

Bernard Caulfield for the defendants.

The arguments appear sufficiently from the judgment.

SLADE J., having found the defendants guilty of negligence and awarded the plaintiff £450 general damages, continued: I now come to the special damage, which raises an interesting point of law on the construction of section 2 (1) of the Law Reform (Personal Injuries) Act, 1948, a point upon which counsel tell me, so far as they know, there is no authority.

The point arises in this way. The plaintiff was incapacitated from his work by this accident from November 15, 1949, to

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[1] Law Reform (Personal Injuries) Act, 1948, s. 2 (1): "In any action "for damages for personal injuries ". . . there shall in assessing those "damages be taken into account, "against any loss of earnings or "profits which has accrued or probably will accrue to the injured person from the injuries, one half of "the value of any rights which have "accrued or probably will accrue to "him therefrom in respect of industrial injury benefit, industrial disablement benefit or sickness benefit "for the five years beginning with "the time when the cause of action "accrued."

December 22, 1949, resulting in the loss to him in wages of £47 15s. 6d. During that period he received industrial injury benefit at the rate of £2 11s. 6d. a week, amounting in the aggregate to £12 17s. 6d. It is agreed that under section 2 (1) half that sum, that is to say, £6 8s. 9d., is deductible from the £47 15s. 6d., leaving £41 6s. 9d. After returning to work the plaintiff received three further sums amounting in all to £126 13s., which were paid in respect of disablement benefit. Half that sum is £63 6s. 6d. Mr. Caulfield contends that, as the benefit of £63 6s. 6d. exceeds the loss of £41 6s. 9d., he is entitled on the true construction of section 2 (1) to use the £63 6s. 6d. to extinguish the £41 6s. 9d., though he does not claim to deduct the balance from the general damages of £450.

Translating the material words of the section into the figures of this action, I read the section as saying: "There shall in "assessing the damages for personal injuries be taken into "account against the loss of £47 15s. 6d. one half of the value "of any rights which have accrued to the injured person in "respect of industrial injury benefit or industrial disablement "benefit." Therefore, it seems at first sight clear that Mr. Caulfield's argument is correct. It might be argued that he is entitled to have the whole £63 6s. 6d. taken into account so as to reduce the general damages, but he does not claim that, because the excess might be said not to be taken into account against the loss of earnings. Mr. McIntyre observes, first, that the words are "take into account" half, not "deduct" half; therefore, one is not bound to deduct a half. Secondly, he contends that, in any event, the section only relates to the taking into account of benefits which have accrued during the period of the incapacity, in the present case during the five weeks in which the plaintiff suffered his loss of earnings.

To give effect to Mr. McIntyre's second contention seems to involve reading into the section some such words as these: "In "any action for damages for personal injuries . . . there shall "in assessing those damages be taken into account, against any "loss of earnings . . . one half of the value of any rights which "have accrued or probably will accrue to [the injured person] "*during the period in which the losses were sustained.*" I am unable to read any such words into the section, which makes good sense as it is, and I decline to read any such limiting words into it.

As to the words "take into account," the reason why the section does not say "deduct" half the gains from the whole of the losses may very well be, in accordance with Mr. Caulfield's argument, that as half the gains may exceed the losses the words "take into account" are more appropriate than the word "deduct." But be that as it may, the words "take into account" seem to imply discretion, and I think it right to deduct so much of the one half of the benefit as is necessary to extinguish the remaining £41 6s. 9d., and in the exercise of my discretion I so deduct. The special damage is accordingly nil, and there will, therefore, be judgment for the plaintiff for the sum of £450.

Judgment for the plaintiff for £450.

Solicitors: *Hepburns; Carpenters.*

J. D. P.

CUMMINGS *v.* RICHARD THOMAS & BALDWINS LD.

[1952 C. No. 61.]

C. A.

1953
Apr. 23, 24.

Singleton, Hodson and Morris L.JJ.

Factory—Dangerous machinery — Transmission machinery — Dangerous parts of machine — Duty to fence when "in motion or in use" — Machine being adjusted and without electrical motive power — Motion provided by hand—Whether machine in motion—Factories Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 67), *ss.* 12, 13, 14 *&* 16.

By sections 13 and 14 of the Factories Act, 1937, every part of transmission machinery, and every dangerous part of any machinery other than prime movers and transmission machinery, shall be securely fenced unless it is in such a position or of such construction as to be as safe as it would be if securely fenced. By section 16 all fencing or other safeguards must be maintained and kept in position while the parts required to be fenced or safeguarded are in motion or in use.

The plaintiff, a fitter employed in the factory of the defendants, suffered the loss of a little finger when assisting another workman in making adjustments to an electric power-driven Waldrick grinding machine. The motive power of the machine had been cut off, and when it became necessary, in order to rotate the face plate, for the purpose of carrying out the work on which he was engaged, the plaintiff pulled on one of the belts through which electric power was normally transmitted. In so doing the plaintiff's finger was crushed between the belt and a pulley. He sued his employers for damages, alleging that the machine was transmission machinery and that the defendants had been guilty of a breach of their statutory duty to fence and guard the dangerous parts of the machine while in motion.

C. A.

1953

Cummings *v.* Richard Thomas & Baldwins Ld.

The defendants denied any breach of statutory duty, contending that the machine, being dismantled and its motive power having been cut off, was not transmission machinery within the meaning of section 13, and was not in motion within the meaning of section 16:

Held (*per* totam curiam), that the machine in question was transmission machinery and did not cease to be transmission machinery when the motive power was cut off.

Per Hodson L.J.: When one talks about transmission machinery, including various things by which the motion of a prime mover is transmitted, one is describing something by reference to the manner in which power is employed to move the parts in the ordinary way, without the description being limited to what is actually happening at a given moment.

Held, further (*per* Singleton and Hodson L.JJ.; Morris L.J. dissenting), that the word "motion" in section 16 was not limited to motion by mechanical energy; that the dangerous part of the machine was in motion and, it not being fenced and guarded, the defendants were in breach of section 16.

Per Singleton L.J.: If I am wrong in the view which I have formed that this was transmission machinery, I think that it was dangerous machinery. There were belts and pulleys usually worked by mechanical energy, but which could be moved by hand. If it was a dangerous part of machinery, fencing was necessary under section 14, and the requirements of section 16 are applicable.

Appeal from Pearson J. sitting at Swansea Assizes.

The plaintiff, William Cummings, a fitter, sued his employers, Richard Thomas & Baldwins Ld., for damages for personal injuries, alleging negligence and also a breach of statutory duty under the Factories Act, 1937, but the issue of negligence by the defendants was not pressed. On February 12, 1951, the plaintiff and another workman were employed in making adjustments to an electric power-driven Waldrick grinding machine, by drilling holes in what was described as the face plate. The second workman was doing the drilling, and one hole having been drilled it was required to turn round the face plate so that the second hole should be exactly opposite the first. The motor power having been cut off, it was necessary, to move the face plate, to pull on a belt, and while doing this the plaintiff's little finger was caught between the belt and a pulley and the two top joints had to be amputated.

It was contended for the plaintiff that the machine in question was transmission machinery within the meaning of section 13 of the Factories Act, 1937, and that the employers were in breach of their statutory duty to fence it under section 16 of the Act, read in conjunction with sections 13 and 14.[1]

Pearson J., before whom the action was tried on November 26, 1952, found the defendants guilty of a breach of statutory duty. He awarded the plaintiff £325 damages.

The defendants, who now appealed, contended that the machine, being without power and dismantled, was not transmission machinery within the meaning of section 13; that it was not in motion or in use within section 16; that there had been no breach of statutory duty by them; and that the accident had been solely caused by the negligence of the plaintiff.

H. I. Nelson Q.C. and *Gerwyn Thomas* for the defendants.
Marven Everett Q.C. and *Geraint Rees* for the plaintiff.

The arguments of counsel sufficiently appear in the judgments.

SINGLETON L.J. This case is not free from difficulty. The plaintiff, Mr. William Cummings, is an experienced fitter, 51 years of age. He was employed by the defendants, Richard Thomas & Baldwins Ld., for a number of years, and he met with an accident on February 12, 1951. There was a grinding machine in the defendants' factory, and the little finger of the plaintiff's left hand was caught between the belt and the pulley, and he suffered some damage and pain. He brought an action alleging breaches of the provisions of the Factories Act, 1937, on the part of his employers, and also alleging negligence. The issue as to negligence was not seriously raised. The judge said that he was not by any means satisfied that there was any negligence on the part of the employers. The issue has not been argued in this court, though Mr. Marven Everett, who appeared for the plaintiff, said (for some reason that I do not entirely understand) that he desired to keep the matter open.

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[1] Factories Act, 1937, s. 13 (1): "Every part of the transmission "machinery shall be securely fenced "unless it is in such a position or of "such construction as to be as safe "to every person employed or working "on the premises as it would be if "securely fenced."
S. 14 (1): "Every dangerous part "of any machinery, other than prime "movers and transmission machinery, "shall be securely fenced unless it is "in such a position or of such con- "struction as to be as safe to every "person employed or working on the "premises as it would be if securely "fenced."
S. 16: "All fencing or other safe- "guards provided in pursuance of the "foregoing provisions of this Part of "this Act shall be of substantial con- "struction, and constantly maintained "and kept in position while the parts "required to be fenced or safeguarded "are in motion or in use, except "when any such parts are necessarily "exposed for examination and for "any lubrication or adjustment shown "by such examination to be imme- "diately necessary, . . ."

On the claim made by the plaintiff that his employers were in breach of statutory duty, the judge found in his favour, and he awarded damages amounting to £325. The employers appeal against that judgment, and Mr. Nelson on their behalf submitted to this court that Pearson J. had arrived at a wrong conclusion, and that this court ought to enter judgment for the defendants. He submitted further that, even if it could be said that there was on the part of the defendants a breach of the duty which by statute they owed to their employees, the real cause of this accident was negligence on the part of the plaintiff himself, and that this court ought to say so, either by finding him wholly to blame or at least partly to blame.

The machine was a power-driven Waldrick grinding machine, part of which consisted of a face plate rotated by means of belts and pulleys. On the day of the accident something had to be done to this machine. It had not been used for the ordinary purposes of transmission machinery for some weeks. Some part of it had to be replaced, and it was necessary that in the face plate there should be drilled two holes, one directly opposite the other. One of these holes had been drilled immediately before the accident, and at the time of the accident the face plate was being turned round so as to get it in position for the making of the other hole in the correct place. Two men were engaged upon that work: one was the plaintiff; the other was a man who was doing the actual drilling with the help of an electric apparatus which was fixed near by. The plaintiff's work at the time was to cause the face plate to be moved round to the accurate position. It is accepted by the defendants that the right way of doing that in the circumstances was to pull on one of the belts by which and through which power normally was transmitted. The motive power or mechanical energy was cut off from the machine so that if it was desired to move the face plate it had to be done by hand, and it could be done by a pull on the belt. The plaintiff pulled on the belt with his left hand. The machine, according to him, was not working very evenly, and his little finger was caught between the belt and the pulley.

That is the accident which happened, and the case made by the plaintiff in this court and before the judge is based on the safety provisions of the Factories Act, 1937. Those provisions are in Part II of the Act, and in sections 12 to 16. Section 12 provides for the fencing of fly-wheels directly connected with any prime mover and every moving part of any prime mover. [His Lordship read sections 13, 14 and 16, and continued:] It is said that the machine in which the plaintiff's hand was caught was transmission machinery. It was submitted by Mr. Nelson, on behalf of the defendants, that though it might properly have been regarded as transmission machinery at one time, it was not transmission machinery within the meaning of section 13 (1) at the time when the accident took place.

The scheme of those sections is, that by section 12 prime movers must be securely fenced, and by section 13 transmission machinery must be securely fenced; the reason being that it is presumed that fly-wheels on prime movers are dangerous parts of machinery, and transmission machinery is a dangerous part of machinery; it is assumed that they are dangerous for the purposes of sections 12 and 13. By section 14, every dangerous part of machinery in a factory is to be securely fenced. It is a question of fact whether the machinery with which the court is concerned is dangerous machinery. The submission on behalf of the plaintiff is that if the machinery on which this accident happened was not transmission machinery, then it was dangerous machinery within the meaning of section 14. The object of section 16 is to ensure that the guard or safety provision or safety device is of substantial construction and is constantly maintained and kept in position while the parts required to be fenced are in motion or in use.

It was submitted by Mr. Marven Everett that when the plaintiff pulled the belt he caused motion within the machinery, or he moved a part of the machinery; that consequently there was either (a) transmission machinery in motion, or (b) dangerous machinery in motion. The submission made by Mr. Nelson was, as I have said, that this was not transmission machinery, that it was not dangerous machinery, that in any event it could not be said that it was machinery of either class in motion at the time of this accident.

Transmission machinery is defined in section 152 of the Act: "'Transmission machinery' means every shaft, wheel, drum, "pulley, system of fast and loose pulleys, coupling, clutch, "driving-belt or other device by which the motion of a prime "mover is transmitted to or received by any machine or "appliance." It is not disputed that this machine was machinery within that definition at the time that it was coupled up and working by means of mechanical energy. Prime mover is defined in the same section: "'Prime mover' means every "engine, motor or other appliance which provides mechanical "energy derived from steam, water, wind, electricity, the combustion of fuel or other source." "Machinery," by the same defining section, "includes any driving-belt."

We have been supplied with photographs of this machine. The first one shows the belt where the hand was caught. The second one shows the same part with a guard. The fourth one shows the side of the machine without a guard. I have reached the conclusion that this was transmission machinery though power had been cut off from it some time before the accident happened. I do not think that it thereby ceased to be transmission machinery. Mr. Nelson's argument was that there must be some limit placed upon the words, otherwise you would have to regard something of this kind as transmission machinery if it was on its way to the works, or if it had reached the factory yard and was placed there; and, again, if it was dismantled wholly or in part, one part could still be regarded as a part of transmission machinery.

It seems to me that it is a question of fact for the judge, in the case of machinery of this kind, to consider on the precise words of section 13 whether or not that on which an accident happens is a part of *the* transmission machinery at *the* time the accident happened, not a moment or a second before or afterwards. If the machinery is in the factory ready for use by mechanical energy, I should think, as the judge thought, that it remains transmission machinery. If it was dismantled to an extent, the court would decide whether in the circumstances some part of it which was there still was a part, not of transmission machinery, but a part of *the* transmission machinery, taking the precise words of the Act. I think that this was.

Then it is said that it was not in motion, and section 16 provides that the safeguard or fencing shall be constantly maintained and kept in position while the parts required to be fenced or safeguarded are in motion or in use. It was not contended that the transmission machinery was in use at the time, but it was submitted on behalf of the plaintiff that it was in motion when it was put into motion by the plaintiff, who pulled the belt. To that Mr. Nelson replied: "You must look at "the definition of 'transmission machinery' and of 'prime "'mover,' and you find then that the whole outlook is based on "movement by mechanical energy."

That is an interesting argument, but I find myself unable to read it into section 16. Transmission machinery is presumed to be dangerous machinery; it has to be fenced or guarded, and the fence has to be maintained when that machinery is in motion or in use. There may be just as much danger, or at least considerable danger, if part of that transmission machinery is moved by hand. Once it is established that it is transmission machinery I do not regard it as necessary to show that the movement or motion of that machinery, or of part of it, is by means of mechanical energy. The words in section 16 are: "shall be . . . constantly maintained and kept in position while "the parts required to be fenced or safeguarded are in motion "or in use," not "in motion by mechanical energy or in use." It seems to me that the submission which Mr. Nelson makes on this would be asking the court to read into the section words which are not there, and I do not think that that is necessary to give a meaning to the section.

In my view, this was at the time transmission machinery, and it was in motion, and, therefore, the provisions of section 16 apply. There was no guard at the time, or no fencing, and an accident happened. Prima facie there is a breach of section 16 of the Act, though a proper guard had been supplied for the machine and was used when the machine was working for its ordinary purpose.

If I am wrong in the view which I have formed, that this was transmission machinery, I think that it was dangerous machinery. There were belts and pulleys, usually worked by mechanical energy but which could be moved by hand. This accident shows that there was danger to someone who moved a belt by hand, for the little finger of the plaintiff's left hand was caught between belt and pulley. If it was a dangerous part of machinery, fencing was necessary under section 14 of the Act, and the same requirements of section 16 are applied to something within section 14 as to transmission machinery within section 13. So that under one section or the other this part of machinery ought to have been fenced at the time when the accident took place.

Some authorities were cited to the court; I do not think that they help greatly in solving the question before the court. One must look at the precise words of each of these sections in order to form a view of the submissions put before the court. I repeat that I do not think that it is an easy case.

A further question arises, and that is on the submission made by Mr. Nelson that the plaintiff himself was guilty of negligence which brought about his accident. The judge, in describing what was done, said: "Then it was necessary to turn "the face plate round in a half circle so that the other hole "could be drilled in an exactly opposite position; so he went "round again to make that alteration in the position of the "face plate by pulling on the pulley belt once more, and he "left his mate to observe the face plate and to advise him when "it had reached the right position. Now pulling on pulley "belts in that sort of way is, according to the evidence, an "ordinary part of what is done by fitters. It is not an extraordinary operation for them; it is an operation which they are "quite accustomed to carrying out, and in this case it could have "been done safely. If he had placed his hand towards the far "end of the upper portion of the belt he could have got "sufficient pull, but his hand only reached about the middle "position between the two pulleys and most unfortunately by "inadvertence on this occasion he caught hold of the pulley "belt somewhere in the middle, and he gave his pull, and that "brought his hand to the end of the belt and on to the smaller "of the two pulleys, the one by the side of the electric motor, "and the top part of his little finger was caught between the "belt and the lower pulley block, and that caused the injury "which resulted in the amputation of the two joints of the little "finger of his left hand."

The judge, having considered the question of a breach of the safety provision of the Factories Act, went on to say: "The much more difficult problem I have to face is whether "there was such carelessness or want of skill as should properly "be regarded as constituting negligence on the part of the "plaintiff, and if so, whether that was the cause of the "accident. I think that if it is to be regarded as constituting "negligence it should be regarded as a cause, but the problem "is whether it constitutes negligence or not. It is a very "difficult question, and a matter mainly of degree, obviously. "On the whole, having regard to the factory conditions and "what has been said about them in *Caswell's Case*,[2] I think, "on balance, it does not constitute negligence on his part. It "is the kind of inadvertence, the kind of inaccurate operation

[2] [1940] A.C. 152; 55 T.L.R. 1004; [1939] 3 All E.R. 722.

"which is to be expected of workmen in factories, in the conditions of hard work and noise and fatigue, and so on, which they have to encounter. On the whole, although it is a difficult question, I hold that there was no negligence on the part of the plaintiff. Therefore the cause of the injury is wholly ascribable to the breach of statutory duty."

[His Lordship read from the evidence given by the plaintiff at the trial and continued:] I do not think that any good purpose would be served by my repeating the words used by Lawrence J. in *Flower* v. *Ebbw Vale Steel and Iron Co. Ld.*[3] nor by reading passages from the speeches of Lord Atkin and Lord Wright in *Caswell* v. *Powell Duffryn Associated Collieries Ld.*[4] The law is there stated, and it is clear that one ought not to be too ready to find negligence against a workman in a factory. The decisions in those cases were, of course, before the Law Reform (Contributory Negligence) Act, 1945, and the result of negligence on the part of the injured workman is not the same now as it would have been then. But the test whether there was negligence on the part of the workman remains the same. It has to be remembered that a workman in a noisy factory may do things which are foolish. He may cause an accident to himself or to someone else by inadvertence. But this was an experienced fitter; he was not an ordinary workman in the factory, he was a man employed on work of adjustment. He was doing something to the machine on which he was working in the nature of repair or adjustment. He was a man 51 years of age who was being paid £10 a week because he was an experienced fitter. He was engaged on a very simple operation; there was nothing difficult about it. One other man was working with him. That man's duty was to tell him when to stop when he had got the face plate in the right place. There were two of them engaged on the simplest of operations—the moving of the face plate.

Having given my best attention to that which has been said in years gone by on the subject of negligence, and being, I hope, always slow to find a workman in a factory guilty of negligence, I think that this workman was guilty of negligence. If I had been sitting as a judge of first instance in this case I should have taken that view, that is, that this accident was very largely due to the workman's own negligent act. But I am not sitting as judge of first instance. The judge had witnesses before him, and the only one upon this side of the case was really the plaintiff himself. The judge, though he felt considerable doubt about it, reached the conclusion that the plaintiff was not negligent. Again, I say that this court ought to hesitate before interfering with the view of a judge who sees and hears the witnesses, while all that we see is a transcript of the evidence. I am inclined to think that with that in mind I should still have said that the plaintiff ought to have borne some considerable part, the greater part, of the responsibility for this accident. But one member of the court takes the same view of the position as Pearson J. did, and if there be a division of opinion in this court upon that matter, I am satisfied that this court ought not to interfere with the view of the judge of first instance.

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[3] [1934] 2 K.B. 132.

[4] [1940] A.C. 152.

For those reasons, I have reached the conclusion that this appeal must be dismissed.

HODSON L.J. [after stating the facts]: I will consider first the question of contributory negligence raised by the defendants. I confess that, having read the evidence only, I should be ready to arrive at a conclusion that the cause of the accident was to a very great extent the negligence of the plaintiff. But in this matter one is bound to remember that the reading of the evidence is not enough. When considering the conduct of a workman in a factory the man himself has to be considered, and the judge who tried the case had in mind the observations of Lawrence J. in *Flower* v. *Ebbw Vale Steel & Iron Co. Ld.*,[5] approved by Lord Atkin and Lord Wright in *Caswell's* case[6]: "the tribunal of fact "has to take into account all the circumstances of work in a "factory, and that it is not for every risky thing which a workman "in a factory may do in his familiarity with the machinery that "a plaintiff ought to be held guilty of contributory negligence." Having seen the plaintiff and having that passage in mind, Pearson J. came to the conclusion that he was not prepared to find him guilty of negligence. For reasons which my Lord has given, I feel that we ought not to disturb his finding, although in the cold light of the transcript it does look as if he and I would have arrived at a different conclusion if we had tried the case.

The other part of the case depends on the question whether or not the employers are in breach of the Factories Act, the material sections being sections 12 to 16, and the chief relevant sections being sections 13 and 16. The breach complained of is that the defendants failed constantly to maintain and keep in position the guards or fencing while the machinery was in motion. The accident occurred when the machinery was being moved by the man's hand and not by the power. Mr. Nelson, on behalf of the employers, very rightly says that in construing these sections one has to consider them as a whole and make up one's mind what is the proper meaning to be attached to particular words without necessarily being tied to their literal meaning. In referring to the judgment of the judge, he admitted that in construing the sections the judge had interpreted them literally, and he did not complain of his interpretation except in that sense which I have mentioned. [His Lordship read sections 12, 13, 14 and 16, and continued:] It is clear from the way in which sections 12 and 13 are worded that prime movers and transmission machinery may be said to be things which are presumed to be dangerous, whereas in section 14 parts of machinery other than prime movers and transmission machinery are mentioned which have to be shown to be dangerous.

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[5] [1934] 2 K.B. 132.

[6] [1940] A.C. 152, 166.

The first argument put forward by the employers was that on the facts as found by the judge, the power being off, the machinery was not transmission machinery at all. This argument was stated in this way: that as no power was being transmitted from the prime mover, the transmission machinery ceased to be transmission machinery at all, and the regulations did not apply. But that argument was not very strongly pressed, and I think that Mr. Nelson recognized that it was at least a sound view of the sections and the definitions that the first three sections were descriptive of the machinery to which the sections were to apply and of the required safety precautions, and that when one talks about transmission machinery, including various things by which the motion of a prime mover is transmitted, one is describing something by reference to the manner in which power is employed to move the parts in the ordinary way, without the description being limited to what is actually happening at a given moment. Therefore, I think that there is really no difficulty in arriving at a conclusion that this was transmission machinery. I think (as Morris L.J. drew to the attention of counsel in the course of the argument) that section 20 also supports that view: "A woman "or young person shall not clean any part of a prime mover . . . "while the prime mover . . . is in motion." The transmission machinery remains transmission machinery whether the power is on or not, and that, I think, covers the position in this case.

The more serious argument put forward by the defendants was that even if this is transmission machinery, it is not

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machinery "in motion or in use," as the phrase is used in section 16; accordingly, there is no breach, because at no material time was the guard required to be on. It is not argued here that the machine was in use, but the question remains: "Was it in "motion?" and this is the vital question. One remembers that, so far as one can gather a general indication from these sections, the object aimed at is to prevent people being hurt by moving machinery.

The word "motion" must obviously be given some limit in its interpretation. It cannot be interpreted quite literally. Mr. Nelson reinforced his argument by referring to a Scottish case, *Parvin* v. *Morton Machine Co.*,[7] a case on section 14 and section 20 of the Act. If I read a passage from the judgment of the Lord Justice-Clerk (which I am taking from a report of an English case, *Thurogood* v. *Van Den Berghs & Jurgens Ld.*[8]) it will explain, I think, the nature of the argument: "At first blush I should have thought that the "purpose of this part of the Factories Act was to lay down "general provisions for ensuring the safety of the plant and "equipment which is installed in the factory for the purposes "of manufacturing whatever is the product of the factory and "that the nature and character of the product was a separate "matter, calling for separate treatment in appropriate cases. "Indeed, it is only where the product of the factory is machinery "or machines that the problem arises. The argument is that "the words 'any machinery' which occur in section 14 (1), and "'any machine' which occur in section 20, are unequivocal and "adequate to cover the dough-brake and that, as the purpose of "this part of the Act is the safety of the employees, we should "lean to a construction which promotes safety. This argument "seems to me to lay too much stress on the particular use of "'any' and to put out of view the general context in which "the words 'any machinery' and 'any machine' are found. "The significance of apparently general words must be governed "by the setting in which they are found." The Lord Justice-Clerk came to the conclusion that the words "any machinery," wide and general as they are, were not apt to cover machinery in course of manufacture in the factory.

Mr. Nelson used that case as an illustration of what he was putting before this court, namely, that the word "motion" must not be interpreted absolutely literally, because if that is so it would cover, for example, the raising of the apparatus from the floor by crane, and that would clearly not be within the language of the section. I agree that the question, and the difficult question, to be decided is: where is this line to be drawn? One has to consider what effect the definitions contained in section 152 of the Act have in construing section 16 and, in particular, the words "in motion or in use."

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[7] 1950 S.C. 371.

[8] [1951] 2 K.B. 537, 549; [1951] 1 T.L.R. 557; [1951] 1 All E.R. 682.

I think that Mr. Nelson's argument may be put shortly in this way, that machinery is not in motion within the meaning of section 16 if it is not in motion under the power derived from the prime mover, and that this is clear when one looks at the definition of "prime mover" in section 152. There would, I think, apart from the definition, be no warrant for implying after the words "are in motion or in use" the words "under "mechanical power." The question is whether the definition drives one to do so.

In my judgment it does not so do. If one bears in mind that the definitions are merely describing the transmission machinery in the one case and the prime mover in the other, and describing them by reference to the manner in which they work, they do not, to my mind, cease to be these things because they are not at the material moment working in the manner contemplated by the definition, in that the power is cut off. They can, in my view, still be in motion within the language of the section even though they are put into motion by the hand of the operator and not by the power. In those circumstances I find that I agree with my Lord, and with the judge, that the machine was in motion and that the regulations apply. I should perhaps add that I have no difficulty in arriving at the same conclusion as the judge, that if there is a breach it was the cause of the accident.

The further point as to negligence at common law on the part of the employers has been kept open by Mr. Marven Everett without any elaborate argument, but I confess I feel in the same position as the judge, that it is by no means obvious to me that there is any evidence of negligence, apart from the breach of statutory duty, against the employers.

For those reasons I agree that the appeal fails.

MORRIS L.J. I regret to find myself in this case unable to share the conclusions which have been expressed by my Lords.

The circumstances of this case were special and particular, and the case depends upon its own facts. The accident happened on this grinding machine at a time when it was dismantled, when it was all stripped down, and when it had been out of action for some five or six weeks. The machine was not in use: it is not suggested that it was. It was having work done on it in order partly to effect alteration and partly repair. The accident occurred to a fitter, in whom was vested some discretion as to how he should operate.

Some of the facts to which I have just briefly referred can best be noted if I read a few questions and answers from the transcript. The plaintiff was asked: "(Q.) Was it in fact being "dismantled in order that another form of drive could be applied "to it? (A.) Yes, a different drive on the bigger roll. (Q.) And "to your knowledge how long had the machine been dismantled— "out of action? (A.) I could not say exactly how long, but it "was all stripped down for different parts. (Q.) As far as you "know, how long had it been out of action? (A.) Five or six "weeks. (Q.) On the day you went there it had been stripped "down? (A.) Yes, all stripped down. (Q.) And had the guard "on the pulleys been removed? (A.) Yes, all taken off. (Q.) "Were the instructions which you were given to drill two holes "in the face plate? (A.) Yes. (Q.) And for that purpose did "you use a pneumatic drill? (A.) Yes."

Then he described how the pneumatic drill was fixed in a stationary position. What had to be done was to drill two holes in the face plate, one hole being immediately above the other, and the positions of the holes had to be accurate. The result was that when one of the holes was drilled the face plate had to be turned a half-circle. Before the first hole was drilled the face plate had to be put into position. The plaintiff caused the correct position to be achieved by an operation similar to that which he later employed at the time when he caught the tip of the little finger of his left hand. He moved the face plate by pulling on the belt and causing, as a result, the shaft on the main machine to revolve, which had the result that the face plate was brought into position. He was one of three people who were doing work on this machine. He was asked: "Were there not you and "Corbett, the fitter, and another man?" and he said, yes, there were, that other man being no longer alive. He described how the accident happened and he used the words "light and heavy" in reference to the movement, which suggest that when pulling on the belt sometimes the movement was easy and at other times it was not. He was asked: "Did you do this precise work in "order to bring this very face plate and belt into position before "you drilled the first hole ? (A.) I pulled the belt into position "for the first hole."

Mr. Price, who was called on behalf of the defendants, was asked: "With regard to men in this man's grade and class, "are they skilled workmen ? (A.) Yes." The plaintiff described himself as an upgraded fitter, and he had been a fitter for some eight or 10 years. Mr. Price was asked: "Is there anything "to prevent them, in the type of work they do, from having their "own little ideas how to do a thing if they want to ? (A.) None "whatsoever. (Q.) Are they expected to do that type of thing ? "(A.) They are fully expected to do so. (Q.) There was repair "work being done under adjustment ? (A.) Yes."

The plaintiff was recalled to clear up one matter, and he was asked by the judge: "Is it an ordinary occurrence in the "course of your job as a fitter to pull on the belt of a pulley to "rotate it? (A.) Yes. (Q.) That is quite a normal thing you "would do once a week or even more than that? (A.) Yes."

The photographs which have been put before us to demonstrate the working of this machine show that its purpose is to grind certain rollers. The rollers are put into the machine and are fixed to what is called the face plate. The face plate is caused to revolve at speed, and the grinding or polishing process is achieved by the part of the machine which is clearly shown on a photograph, by which pressure is applied to the side of the roller as it is rotated at speed. The rotation movement is produced by the part of the machine which is shown on the extreme right in the photographs. There is a dynamo, and rotation is caused by electrical energy; the rotation is then transmitted to the main part of the machine by means of the belts that are shown. It was in the circumstances and the setting to which I have referred that this accident occurred, that is to say, at a time when the machine was out of commission, when it had been dismantled and stripped down, and when work was being done on it, not by way of operating it by those who normally operate it, but by fitters.

My Lords have referred to the relevant sections of the Factories Act, and I do not, therefore, pause to read them. I think that it is right to say that while some of the sections impose a duty, section 16 defines the duty. The matter was so expressed in a case in the Divisional Court, *Smith* v. *Morris Motors Ld.*,[9] where Lynskey J. in his judgment said: "The effect of section "16 is to indicate how and when the duty imposed under sections "12, 13 and 14 is to be carried out. That duty is to be carried "out so far as the provision of fencing is concerned, by providing "fencing of substantial construction and it is further to be "carried out by constantly maintaining the fencing, which means "keeping it in good and efficient working order, and repair; and "also keeping it in position while the parts required to be fenced "or safeguarded are in motion or use, with certain exceptions." I think that those words clearly state the position. The exceptions to which the judge referred are the exceptions set out in section 16, and it is not contended that they apply in the present case.

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[9] [1950] 1 K.B. 194, 200; 65 T.L.R. 642; [1949] 2 All E.R. 715.

I have come to the conclusion that that part of the machine where the upper parts of the belts are attached and the belts, would be correctly described as transmission machinery, and I do not agree with the submission of Mr. Nelson that those parts cease to be transmission machinery merely because they are not in motion. Section 16, which defines the duty, provides that: "All fencing or other safeguards provided in pursuance of the "foregoing provisions of this Part of this Act shall be of substantial construction, and constantly maintained and kept in "position while the parts required to be fenced or safeguarded are "in motion or in use," with an exception which does not apply. A consideration of section 20 lends support to the view that the description of "transmission machinery" is one that still applies even though the transmission machinery is not in motion or in use.

Mr. Marven Everett has not submitted that the transmission machinery in this case was in use. It therefore seems to me that the question in this case resolves itself into what is really a short question, namely, was this transmission machinery "in "motion"? The purpose of the transmission machinery was to transmit, and what is transmitted by transmission machinery is the motion of a prime mover. The power was all turned off. There was no question of any operation of the prime mover. "Prime mover" is defined to mean, "every engine, motor or "other appliance which provides mechanical energy derived from "steam, water, wind, electricity, the combustion of fuel or other "source." It is not necessary to express an opinion upon the point, but it suffices to say that Mr. Marven Everett did not contend that the words "other source" include manual power. Transmission machinery is defined to mean, "every shaft, wheel, "drum, pulley, system of fast and loose pulleys, coupling, clutch, "driving-belt, or other device by which the motion of a prime "mover is transmitted to or received by any machine or "appliance." It seems to me that in this case there was no motion of the prime mover; there was no mechanical energy: there was nothing to transmit, and no transmission was taking place. What happened was that the plaintiff in his discretion thought that the right way to get the face plate in position was to pull on the belt.

The point is a short one, and my opinion can be briefly expressed. I feel that it is unreal to say that the transmission machinery was in motion. I do not feel that in any practical sense can it be said to have been in motion. The facts in the present case do not, in my judgment, come within the scope, or the spirit, or the intention of the words, transmission machinery "in motion."

For those reasons, though I express an opinion contrary to that of my Lords with every diffidence, I have reached the view that it was not shown here that there was any breach of statutory duty. I do not pause to cite passages from *Carroll* v. *Andrew Barclay & Sons Ld.*[10] I merely say that our attention was called to certain phrases in some of the speeches in that case which seem consistent with the view which I have endeavoured to express.

As my Lords have said, Mr. Marven Everett stated at the end of his submissions that he desired to keep open the point that there was negligence on the part of the defendants, and that he could succeed on that ground even if he did not establish a breach of statutory duty. We have had no argument in regard to that matter. Mr. Marven Everett said that he kept the point open. So far as I am concerned he kept it so open that I do not know where it is: and I am certainly not persuaded that any negligence was shown. I would, therefore, have allowed this appeal on the ground that there was no breach of statutory duty and that I am not satisfied that there was any negligence on the part of the defendants.

If I had been of the contrary opinion, then I would have had to consider the question whether there was negligence on the part of the plaintiff, and again, on this part of the case I regret that my views do not coincide with those of my Lords. I share the conclusion reached by the judge. The guidance given by the

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[10] [1948] A.C. 477; 64 T.L.R. 384; [1948] 2 All E.R. 386.

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Morris L.J.

House of Lords in *Grant* v. *Sun Shipping Company Ld.*[11] was expressed by Lord Porter in these words: "This matter is largely "a question of fact and if there was evidence from which a "tribunal could fairly come to the conclusion that the pursuer "was not himself negligent and if the judge or jury before whom "the case was tried came to that conclusion, I imagine your "Lordships would not interfere with the decision. It is, I think, "not in dispute that the decision has to be made in the light "of the characteristics of the type of men affected."

Having re-read the evidence of the plaintiff I form the view, so far as one can form a view from a shorthand note, that he was not a very shrewd man and perhaps not very alert in answering questions. But the judge saw the plaintiff and could form an opinion in regard to him. It seems to me that the note of the plaintiff's evidence revealed a man zealous in his work, and I think that what happened here was aptly described in the words of the judge as being "inadvertence" or "inaccurate operation." There was, perhaps, an error of judgment in the mode of operating at the particular moment, but I would not consider that it was an error amounting to negligence. I would not, therefore, have felt that the plaintiff was guilty of contributory negligence. It seems to me that this unfortunate, but happily not serious, accident is just the sort of accident which should be covered by the provisions that are made in regard to industrial injuries.

Appeal dismissed.
Leave to appeal to House of Lords.

Solicitors: *Kenneth Brown, Baker, Baker, for Gee & Edwards, Swansea; W. H. Thompson.*

A. W. G.

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[11] [1948] A.C. 549, 555; [1948] 2 All E.R. 238.

1953
May 11.

McNair J.

SLADE AND ANOTHER *v.* METRODENT ~~LD.~~ LTD.

Master and Servant—Infant—Apprenticeship deed—Arbitration clause—Action by infant—Deed for benefit of infant—Stay of proceedings—Arbitration Act, 1950 (14 *Geo.* 6, *c.* 27), *s.* 4 (1).

Where a deed of apprenticeship to which an infant is a party contains an arbitration clause, that clause cannot be treated as an independent agreement separate from the deed, and even assuming that the clause is not beneficial to the infant, he will, nevertheless, be bound by it if the agreement as a whole is for his benefit.

Clements v. *London and North Western Railway Co.* [1894] 2 Q.B. 482, and *Heyman* v. *Darwins Ld.* [1942] A.C. 356; 58 T.L.R. 169; [1942] 1 All E.R. 337, applied.

SUMMONS adjourned into open court.

By an indenture dated August 31, 1949, made between a company, the second plaintiff, John Frederick Slade and the first plaintiff, Alan John Slade, an infant, the infant plaintiff placed himself as apprentice to the company to learn the craft of dental mechanics from September 5, 1949, for five years. The indenture contained a clause whereby the parties agreed that all questions or differences which might at any time arise between the parties relating to the subject-matter of the indenture should be referred to the National Joint Council for the Craft of Dental Technicians. In 1950, all rights, liabilities and obligations of the company were transferred to the defendant company, Metrodent Ld. In February, 1953, the infant plaintiff, by his father, the second plaintiff, and the second plaintiff on his own behalf issued a writ against the defendants claiming that the defendants, in breach of their obligations under the indenture, had failed to teach or instruct the infant plaintiff and had repudiated the indenture. On March 5, 1953, the defendants, relying on the clause providing for submission to arbitration, applied to Master Burnand for a stay of further proceedings pursuant to section 4 of the Arbitration Act, 1950. The master having refused a stay, the defendants appealed to McNair J. who, on March 20, adjourned the summons into open court for judgment.

Neil McKinnon for the defendants.
J. G. K. Sheldon for the plaintiffs.

Cur. adv. vult.

May 11. McNAIR J. read the following judgment: This is an appeal by the defendants against the decision of Master Burnand given on March 5, 1953, by which he refused to stay further proceedings in the action pursuant to section 4 of the Arbitration Act, 1950. In the action, which was commenced by writ dated February 2, 1953, the first plaintiff (who is an infant suing by his father and next friend, John Frederick Slade) and John Frederick Slade, the second plaintiff, sue the defendants under the terms of an apprenticeship deed dated August 31, 1949, by which the infant plaintiff bound himself apprentice to the defendants, to learn the craft of dental mechanics for a period of five years. The second plaintiff, as the guardian, joined in and assumed obligations under the deed.

In summary, the claim in the action is that the defendants failed and neglected properly or at all to teach or instruct the infant plaintiff or to cause him to be taught or instructed as aforesaid and have repudiated the indenture and their obligations thereunder. Before taking any step in the action the defendants applied to the master to stay the proceedings under section 4 of the Arbitration Act, 1950, relying on clause 6 of the indenture, which is in the following terms: "The parties to this indenture "hereby jointly and severally agree that all questions or differ-"ences whatsoever which may at any time hereafter arise "between the parties hereto or their respective representatives "touching these presents or the subject-matter thereof or arising "out of or in relation thereto respectively and whether as to con-"struction or otherwise shall be referred to the National Joint "Council for the Craft of Dental Technicians and each of the "parties shall do all acts and things and execute all deeds and "instruments necessary to give effect to the award to be made "pursuant to this submission." It being conceded or, if not conceded, established to my satisfaction that this clause would (subject to the question of infancy) constitute a valid arbitration agreement within the meaning of section 4, the onus lies on the plaintiff to satisfy me that effect should not be given to it.

Counsel on behalf of the infant plaintiff argued (1) that as a matter of principle, an agreement by an infant to submit to arbitration is voidable at the infant's election, and (2) that, assuming that the arbitration agreement is binding on the infant, the court as a matter of discretion ought not to stay the action. In support of the first submission counsel relied on a passage in Bacon's Abridgment, Arbitrament, C, which states that "If an "infant submit to arbitration, he may execute or avoid it at his "election, as he may all other his contracts," and a passage in Comyn's Digest, Arbitrament, D 2: "But an infant cannot "submit to arbitrament; for his submission is void. Yet, if an "infant and a man of full age join in a submission, it is good; "for though the infant cannot be obliged to stand to it, yet his "submission is only voidable, and he may agree or disagree, to "the award at his full age."

Certain modern text books take the same view. For example, in Chitty on Contracts, 20th ed., p. 598, it is stated that "He "[the infant] is not bound by an agreement to refer a dispute "to arbitration." Again, in Halsbury's Laws of England, 2nd ed., Vol. 1, p. 625, one finds the following view expressed: "With regard to infants, it would seem that a submission made "by an infant could not be enforced against him during his "infancy, and would be voidable by him on attaining his "majority . . ." On the other hand, in Russell on Arbitration, 14th ed., p. 18, after reference has been made to the passages in Bacon's Abridgment and Comyn's Digest above quoted, the proposition is stated thus: "The result . . . seems to be that a "submission to arbitration by an infant is voidable by him and "cannot effectively be ratified, except when it relates to the "supply of necessaries, a reasonable contract of service, or a "contract plainly for the infant's benefit, and then it is binding "upon him even during infancy, and quite apart from any "question of ratification."

In my judgment the question before me falls to be determined on two well-established principles, (1) that an infant, even during infancy, is bound by any contract which the court considers, after examining all its terms, is for the benefit of the infant, and (2) that if the contract as a whole is beneficial, the infant cannot pick and choose and adopt those terms which are clearly beneficial while rejecting those terms which are not beneficial or not clearly beneficial: see *Clements* v. *London and North Western Railway Co.*[1] The judgment in that case of Kay L.J.[2] sets out a quotation from Coke upon Littleton, 172a, to the effect that there are some exceptions to the infant's inability to bind himself by contract, as "an infant may bind himself to pay for his "necessary meat, drink, apparel, necessary physicke, and such "other necessaries, and likewise for his good teaching or instruc"tion, whereby he may profit himself."

The question for the court in any particular case of an apprenticeship deed is whether the agreement as a whole is for the benefit of the infant. In *Wood* v. *Fenwick*,[3] the interlocutory observations of Alderson B. and Abinger C.B.[4] clearly indicate that an apprenticeship deed containing an arbitration clause might in their view be beneficial to an infant. Having examined the apprenticeship deed here in question, I am clearly of the opinion that the deed as a whole is beneficial as it provides for the instruction of the infant in the art of dental mechanics by an

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[1] [1894] 2 Q.B. 482.

[2] Ibid. 490.

[3] (1842) 10 M. & W. 195.

[4] Ibid. 204.

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active practitioner at a wage and under conditions approved by certain professional and trade bodies of high standing. The deed itself requires registration with the National Joint Council of the Craft of Dental Technicians, a body upon which, as I am informed, both employees and craftsmen are represented, and it is improbable that such a body would accept for registration any deed which was not beneficial to the apprentice.

Even assuming, but not accepting, that the clause providing for the reference of disputes arising thereunder to the arbitrament of the Joint Council would, standing by itself, be considered not beneficial to the infant, he would, in my judgment, nevertheless be bound by it if the agreement as a whole was for his benefit, as I have found.

An attempt was made to meet this conclusion by the submission that the arbitration clause is to be treated as an independent agreement separate from the deed itself. The argument in support was based on the decisions which have established that the arbitration clause may be effective even though the main contractual obligations have been discharged by breach or by frustration or by illegality. In my judgment, this argument is unsound and is not supported by the decision in *Heyman* v. *Darwins Ld.*[5]: see in particular the speech of Lord Macmillan.[6] Furthermore, in the present case, seeing that the infant is adopting the apprentice deed by suing upon it, it is not open to him to reject the arbitration clause which forms part of it.

As regards the question of discretion, I feel no hesitation at all in holding that, in my judgment, the arbitration clause should be given effect to. The nature of the dispute as shown by the statement of claim is essentially one fit to be adjudicated upon, at any rate so far as concerns matters of fact and the practice of the art of dental mechanics, by a body such as the Joint Council. Adjudication before such a body would avoid the necessity of calling a body of expert evidence. Furthermore, the clause in no way involves an ouster of the jurisdiction of the court or in any way interferes with the jealous regard which the court observes for the interests of infants. In my judgment, the action should be stayed under section 4 of the Arbitration Act, 1950, and the appeal allowed with costs.

Appeal allowed.

Solicitors: *Agar-Hutton & Co.; Shaen, Roscoe & Co.*

J. D. P.

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[5] [1942] A.C. 356; 58 T.L.R. 169; [1942] 1 All E.R. 337.

[6] [1942] A.C. 356, 374.

MULREADY *v.* J. H. & W. BELL LD. AND OTHERS.

[1951 M. No. 2437.]

C. A.

1953
May 12, 20.

Lord Goddard C.J., Birkett and Hodson L.JJ.

Building — Contractor — Subcontractor — Failure by subcontractor to comply with statutory requirements—Personal injuries to employee of subcontractor—Contractor's liability for breach of duty—Building (Safety, Health and Welfare) Regulations, 1948 (*S.I.* 1948, *No.* 1145), *regs.* 4, 31.

Where a head contractor, who had undertaken to perform an operation which imposed on him the duty to take safety precautions as required by regulation 4 (ii) of the Building (Safety, Health and Welfare) Regulations, 1948, elected to employ a subcontractor to carry out the work, and the latter failed to comply with the requirements of the regulations, the head contractor, even though he had no knowledge of the breach of the statutory duty, remained liable in damages to a workman employed by the subcontractor who sustained injuries as a result of the breach.

Decision of Pearson J. ([1952] 2 All E.R. 663) on the question as to liability under the Building (Safety, Health and Welfare) Regulations, 1948, affirmed.

APPEAL from Pearson J.

By a written contract with the second defendants, Orr's Zinc White Ld., the first defendants, J. H. & W. Bell & Co. Ld., steelwork erectors and sheeters, undertook to supply and fix metal sheeting and to instal three ventilators on the roof of a high building in course of construction as a factory for the second defendants, who were the building owners. Later, by a loose oral arrangement, Bell & Co. agreed with two brothers named Keating that the company should supply the plant, materials and tackle, and that the Keating brothers should supply small hand tools and carry out the work of fixing the roof sheeting and ventilators in position. For that purpose the Keating brothers engaged labour, including the plaintiff, Thomas Mulready, aged twenty-six, a sheeter's labourer. They paid his wages and stamped his card, and he was employed by them from June, 1950, until August 26, 1950. On that date, while he was engaged in placing one of the ventilators in position, he fell some 70 feet from the roof to the ground, and suffered severe injuries, which resulted in the loss of a leg. No safety precautions for persons working on the roof, as required by regulation 31 of the Building (Safety, Health and Welfare) Regulations, 1948, had been taken either by the Keating brothers, as subcontractors, or by any of the defendants.

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The plaintiff brought this action against the first defendants, Bell & Co., claiming damages for negligence at common law and for breach of statutory duty, alleging that the work on which he was engaged when he was injured was an operation within the meaning of regulation 4 of the Building (Safety, Health and Welfare) Regulations, 1948,[1] and that their failure to take any or suitable precautions as required by regulation 31,[2] to prevent his falling off the roof was a cause of the accident. Against the second defendants, the building owners, he alleged that they had failed, contrary to section 26 of the Factories Act, 1937, to provide and maintain safe means of access to his place of work and to provide suitable means by fencing, or otherwise to ensure his safety at his place of work.

Both defendants denied the separate breaches of duty alleged and claimed that the plaintiff had been guilty of contributory negligence.

Pearson J., on July 9, 1952, found that the plaintiff was an employee of the Keating brothers and not an employee of Bell & Co. He said that the contract between Bell & Co. and the Keating brothers was a subcontract of a very partial and minor character, and that Bell & Co. had remained in effective charge and control of the work. He held that they were liable to the plaintiff for breach of regulation 31, since they were undertaking the building operation and performing the act of fixing the ventilators within the meaning of regulation 4. On the common law claim he held that it failed because Bell & Co. were not in any relevant sense employers of the plaintiff. He gave judgment for the plaintiff as against Bell & Co. and awarded him £8,500 damages, of which £892 10s. was special damage.

On the claim against the second defendants, the judge held that as at the material time the building then in course of erection was a place being used solely for non-factory purposes, it did not form part of a factory, and the plaintiff's claim under section 26 of the Factories Act, 1937, accordingly failed.

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[1] Building (Safety, Health and Welfare) Regulations, 1948, reg. 4: "It shall be the duty of every contractor and employer of workmen "who is undertaking any of the operations to which these regulations "apply (i) to comply with such of "the requirements of regulations 5–30 ". . ." (etc.) "as affect any workman "employed by him; . . . (ii) to comply "with such of the requirements of "regulations 31–33 . . . as relate to "any work, act, or operation performed or about to be performed by "such contractor or employer of workmen; . . ."

[2] Reg. 31: "(1) Where work is "done on the sloping surface of a "roof and, taking into account the "pitch, the nature of the surface, and "the state of the weather, a person "employed is likely to slip down "or off the roof, then unless he has "adequate hand hold or foothold or is "not liable to fall a distance of more "than 6 feet 6 inches from the edge of "the roof, suitable precautions shall "be taken to prevent his so falling."

The plaintiff was ordered to pay the costs of the second defendants; but later the judge in the exercise of his discretion on orders as to costs, made a "Bullock order," ordering that the first defendants should pay to the second defendants the costs ordered to be paid to them by the plaintiff. He gave leave to appeal against that order.

The first defendants appealed. Notice of the appeal was served on the second defendants, who were represented on the appeal, though in the events which happened, they were not heard until after judgment had been delivered.

[The case is reported only on the question as to liability under the Building (Safety, Health and Welfare) Regulations, 1948.]

H. I. Nelson Q.C., *R. H. Forrest Q.C.* and *F. L. Clark* for the first defendants. Pearson J., having found that the plaintiff was employed by the Keating brothers, held that Bell & Co. owed him a duty under the regulations. It is submitted that that is wrong and that Bell & Co. were not under any duty to comply with regulation 31. Where something is a quasi-criminal offence, there must be a fixed duty, and that is laid down in the meticulous code provided by the regulations. See the opening words of regulation 4: the whole "operation" here was the construction of a building. The intention of the regulation is to divide up the duties between the various contractors who have entered into contracts to do either the operation or a part of it, and "contractor" in that sense is contrasted with the employer of workmen. Here Bell & Co. were contractors in that they made two contracts, one with the building owners to supply the sheeting and fix the ventilators, and the other with Keating to carry out the actual work. The statutory duty to take the necessary precautions for the plaintiff's safety on the roof was that of Keating, his employers. The judge has found that Bell & Co. had subcontracted the work to Keating.

[LORD GODDARD C.J. But it was for Bell & Co. to say when and how the work was to be carried out. How does that absolve them from the responsibility for preventing men from falling off the roof?]

The regulation does not say that everyone who has made a contract or signed a document shall be responsible, but that the particular subcontractor or person who is "performing" the work shall be responsible. This is a quasi-criminal matter and, if the defendants' contention is not right, the necessary corollary would be that, while every subcontractor would be liable to prosecution for his particular part of the work, the head contractor would be liable for the whole lot.

[BIRKETT L.J. The judge was careful on that issue. He said that if there had been a complete divesting of authority by Bell & Co. the position would have been different, but that they never divested themselves of control, and it was therefore their duty to comply with the regulations.]

One could not go into court on a prosecution and say "Whether "or not I was guilty of a breach of these regulations depends on "how much one party to the contract says he controlled the work "under the terms of the contract." "Undertaking" in the opening words of regulation 4 means undertaking by contract: see regulation 4 (i). The distinction between that word "under-"taking" and the word "performing" in paragraph (ii) is deliberate. The intention is that if an employer has his workmen performing work on the site he must see to the safety precautions. If a contractor subcontracts, the subcontractor must see to them. If it were held otherwise, where is the line of responsibility to be drawn? If a man or a firm has contracted to do the flooring and subcontracts the whole of that work, never going near the site himself, is it to be suggested that he, and not the subcontractor working on the site, is liable for breach of the regulations?

[LORD GODDARD C.J. The usual practice is for the head contractor to protect himself by putting in clauses by which the subcontractors undertake to indemnify him.]

But it is no answer in a police court for the head contractor to plead a written indemnity from his subcontractor.

[LORD GODDARD C.J. I do not see why both should not be liable. The principle "qui facit per alium facit per se" applies where the persons who have undertaken the construction of a building and still have general control of it fail to comply with regulations which, be it remembered, are intended to protect workmen.]

This court must tell the contractors and the employers what their duties are under these regulations. It is a novel point which has never before been decided. If once it is conceded that it does not matter whether the person is actually "performing" the work, and that the phrase in regulation 4 (ii) means performing either by one's self or vicariously by a subcontractor, and there is a whole queue of contractors and subcontractors, there will always be a question on a prosecution as to who is "performing" the work. Regulation 4 (ii) says and means that the only person liable is the person who is physically performing the work. It is the employer, not the contractor, who must take the precautions. Otherwise no contractor, whatever he is doing, will have an answer to a charge, because each of them has "undertaken" to do the work. Where would criminal proceedings end if the principle "qui facit per alium facit per se" were applied?

[LORD GODDARD C.J. It is often accepted in breaches, for instance, of the Food and Drugs Act, because the Act imposes an absolute obligation, as do these regulations for the safety of workmen. A person cannot escape liability by saying that he has employed someone else to do the work. He is performing it by his subcontractor.]

That is a novel and devastating proposition which might be applicable to rights as between parties in a civil action, but it does not provide an answer to the charge of having broken the regulations.

[HODSON L.J. If there were a number of gangs working on the roof, would you say that each would be liable to look after his own part of the roof?]

That is what the regulations say. It is submitted that there are two possible readings of the regulation: (1) that which is submitted for the first defendants, and (2) that which says that every person who enters into a contract and undertakes to do any part of the work is deemed to be performing it, although he subcontracts it. That second reading is both illogical and also makes no allowance for the division of duties so carefully set out in regulation 4. By paragraph (i) each man is restricted in his "operation" to his own employees; and by paragraph (ii) the only person liable is he who physically performs the operation.

[LORD GODDARD C.J. It seems to me a very serious matter to hold that a man is entitled to get rid of his safety obligations by subcontracting. One cannot as a rule assign liabilities, but this would enable one to get rid of them altogether, even to a man of straw whom one might be under no obligation even to insure, and who might not be worth suing.]

That may be. These regulations sometimes operate harshly one way or another. But they have to be construed strictly as they stand. I pray in aid the speech of Lord Simonds in *London* *and North Eastern Railway Co.* v. *Berriman*,[3] citing earlier cases that where there is an ambiguity in regulations the interpretation to be given by the court is that which will avoid a penalty, or alternatively if there are two reasonable constructions the court should elect the more lenient construction. There is here an ambiguity as to the meaning of "performed"; alternatively there are two reasonable constructions of "performed or about to be "performed by such contractor." I contend for the more lenient construction, i.e., that construction which means the work performed in the physical sense by the contractor and his men, and not the more stringent, work performed vicariously. The only connexion which Bell & Co. had with the work was one visit by their director when he gave Keating the plan.

[BIRKETT L.J. Your point is thus very narrow, that Bell & Co. are not liable because they did not perform the work?]

Yes; on the evidence and what the judge has found, a magistrate would be obliged to acquit because he would be bound to say: "You were not doing the work"—unless this court decides that "performing" means any—even a vicarious—performance.

[The remainder of the argument was on the quantum of damages and on the "Bullock order" for costs, neither of which is relevant to the report.]

C. N. Glidewell for the plaintiff. It is submitted that the words of regulation 4 (ii) are sufficiently wide and unrestricted to cover vicarious performance of the work, and certainly to cover vicarious performance in the circumstances of this case. The arrangement between Bell & Co. and Keating was expressly limited to the supply of labour and small hand tools by Keating. Everything else necessary for the performance of the building operation, the subject of the contract between Bell & Co. and the building owners, was to be done by Bell & Co. Performing a building operation is not done merely with physical labour but with plant and appliances necessary for that work. Even on the very narrow construction of physical or actual performance for which the defendants contend, the actual physical performance here was a joint effort by Bell & Co. and Keating, and that brings Bell & Co. into the direct performance within the meaning of regulation 4 (ii). Apart from any question of vicarious liability, Bell & Co. were the only people on whom the duty, both contractually and in every other way, lay to provide that tackle, etc., which was an essential part of the performance of the operation of constructing the building.

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[3] [1946] A.C. 278, 313–5; 62 T.L.R. 170; [1946] 1 All E.R. 255.

Further, on the judge's findings, Bell & Co. were vicariously performing through Keating, and regulation 4, on the facts of this case, embraces such vicarious performance. One need not consider the position where a head contractor divests himself wholly of every aspect of the subcontract so that he has nothing whatever to do with it apart from the legal contractual connexion.

[LORD GODDARD C.J. How could he do that unless the building owner was a party to an evasion of the statutory duty?]

He never could do it. The difference between paragraphs (i) and (ii) of regulation 4 is very important. Paragraph (i) is concerned with regulations as affecting any workman employed by the contractor; paragraph (ii) does not deal with workmen at all. The words are "as relate to any work, act, or operation." It may be that "work" is narrower than "act" or "operation," but the latter words are clearly wide enough to cover even those matters which might not come within the word "work," such as control. In having the right to control, one might not be doing any work, but having the control and the right to control the very operation to which the regulation is directed is an "act" or "operation" within the meaning of regulation 4 (ii). There was clearly a breach of regulation 31, and therefore of the duty under regulation 4.

[The remainder of the argument was on the points not relevant to the report.]

Nelson Q.C. replied.

B. S. Wingate-Saul for the second defendants.

Cur. adv. vult.

May 20. LORD GODDARD C.J., reading the judgment of the court, stated the facts and continued: The contract with Keating was arranged orally. There was no written document, and the judge found that Keating was to supply the labour and do the work while Bell & Co. were to supply the necessary material and equipment, except hand tools. He described the arrangement as a subcontract of a very partial and minor character, and he found that the work was to be done under the supervision and control, and in accordance with the instructions of Bell & Co., both with regard to the work to be done and the manner in which it was to be done. We are not clear as to what exactly the judge meant by a subcontract of a very partial and minor character. The sheeting and roofing of this building was a considerable job. We think that he probably meant no more than that it was an informal subcontract, and one in which the main contractor, that is, Bell & Co., retained a considerable degree of control, more than would usually be exercised where a formal subcontract had been executed. In any case there undoubtedly appears to have been a contract between Bell & Co. and Keating for the execution of a part of the work which Bell & Co. had undertaken for Orr's, and we propose to decide the appeal on that footing.

The words of regulation 4 of the Building (Safety, Health and Welfare) Regulations, material to this case are: "It shall be "the duty of every contractor and employer of workmen who is "undertaking any of the operations to which these regulations "apply . . . (ii) to comply with such of the requirements of" (inter alia regulation 31) "as relate to any work, act, or operation "performed or about to be performed by such contractor or "employer of workmen." If reference is made to the full terms of the regulation, it will be observed that the second paragraph differs in one important respect from the first, which we have not set out. That paragraph refers expressly to the observance of those regulations as affecting workmen employed by the contractor or employer, while the second requires compliance with the requirements of certain regulations, including regulation 31, as relate to any work, act or operation performed or about to be performed by the contractor, and contains no reference to workmen employed by him.

Regulation 31 is in these terms. [His Lordship read the regulation and continued:] Mr. Nelson contended that the performance of the work on the roof was here performed by Keating as contractor and not by Bell & Co., and that consequently the latter could not be held to be in breach of the regulation. He said that there is no case to be found in the books where a head contractor has been held liable in these circumstances, and while that appears to be so, equally there is no case which decides that he is not.

The judge decided this case on a somewhat narrow ground, namely, that here Bell & Co. had not divested themselves of the control and direction of the work, so that they could be regarded as themselves performing the act of fixing the ventilators, which was what the plaintiff was actually doing when he fell. He said: "They were still in effective charge and control. I "hold that they were undertaking the building operations and "performing the act of fixing the ventilators within the meaning "of regulation 4." While, in our opinion, his judgment can be supported on those grounds, for ourselves we are prepared to decide the case on the ground that Bell & Co. were the contractors who had agreed with the building owners to do the work, that is to say, to perform the work on the roof and fix the ventilators. Accordingly, we do not see how it makes any difference whether they chose to perform it by their own workmen or by means of a subcontract.

We cannot doubt that they had undertaken to perform the work, and had it not been done, or done in an unsatisfactory manner, it would have been against Bell & Co. only, and not against their subcontractors, that the building owner would have had a remedy. The duty is to provide suitable precautions to prevent men working on the roof from falling, and that is thrown on the person who performs the work who can no doubt choose how he will perform it. If, then, a duty was cast on Bell & Co. who had undertaken to perform the roof work, they cannot avoid it by subcontracting.

The ordinary principle of law which, in our opinion, applies, is nowhere more clearly stated than by Lord Blackburn in *Dalton* v. *Angus*,[1] where he said ". . . a person causing "something to be done, the doing of which casts on him "a duty, cannot escape from the responsibility attaching on "him of seeing that duty performed by delegating it to a "contractor. He may bargain with the contractor that he shall "perform the duty and stipulate for an indemnity from him if "it is not performed, but he cannot thereby relieve himself "from liability to those injured by the failure to perform it." This passage was referred to by the court in *Hardaker* v. *Idle District Council*,[2] in which all the cases on the subject were reviewed. It is true that in that case the duty was owed to the public, but the principle seems to us to apply whether the duty is owed to the public or only to a section of the public. It was followed in *Penny* v. *Wimbledon Urban District Council and Iles*,[3] and in many other cases and, we think, applies here.

Mr. Nelson relied much on the breach of the regulations being a criminal offence, and said that the result of holding Bell & Co. liable in this case would be that they could be prosecuted and

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[1] (1881) 6 App.Cas. 740, 829.

[2] [1896] 1 Q.B. 335, 341, 342; 12 T L.R. 207.

[3] [1898] 2 Q.B. 212.

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fined, when the fault, of which they might have no knowledge, was that of Keating; and that while a contractor can exact an indemnity from his subcontractor for the damages in which he may be cast in a civil action, he could get no indemnity for the fine which might be imposed. Be it so; that only means that he must take care that the necessary precautions are taken by the subcontractor if he does not take them himself. Both he and the subcontractor may be liable both civilly and criminally. Here, Bell & Co. have agreed to perform the work in question; in the course of performing it the precautions were omitted; so in our opinion they are liable.

[His Lordship then considered the amount of damages awarded by the judge and said:] We feel obliged, even with some regret, to say that we think an award of £7,600 is a great deal higher than is usually awarded in comparable cases. We would reduce the general damages by £2,000, thus awarding the plaintiff, with his special damage, £6,492 10s.

The result is that the appeal is allowed and the order varied by reducing the damages to the sum of £6,492 10s.

Appeal as to liability dismissed.
Appeal allowed on the quantum of damages.

Solicitors: *Carpenters for Laces & Co., Liverpool; Manches & Co. for David Blank, Alexander & Co., Manchester; William Charles Crocker.*

M. M. H.

C. A.

CORSINI AND ANOTHER v. MONTAGUE BURTON LD.

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Apr. 23, 24.

Evershed M.R., Birkett and Romer L.JJ.

Landlord and Tenant—Goodwill—Compensation—Application for new lease—Whether business carried on for not less than five years—Title as "tenant" to be shown throughout—"Predecessors in "title"—Landlord and Tenant Act, 1927 (17 & 18 *Geo.* 5, *c.* 36), *ss.* 4 (1), 5, 25.

A tenant who, on quitting a holding, seeks compensation by virtue of section 4 (1) of the Landlord and Tenant Act, 1927 (or the grant of a new lease under section 5 of the Act in lieu thereof), for the loss of goodwill which has become attached to the premises "by reason of the carrying on by him or his "predecessors in title at the premises of a trade or business "for a period of not less than five years," must prove either that he as tenant has, or that his predecessors in title in the capacity of tenants have, carried on the business in the premises for five years, or that in the aggregate they have carried on the business for that period. Accordingly, tenants to whom a term of four years had been assigned could not sustain a claim although the assignors had for some years, prior to becoming tenants, carried on business in the premises with the sanction and knowledge of the then tenant.

"Predecessors in title" in section 4 (1) means persons who had the title to the premises to which the tenant succeeded: *Williams* v. *Portman* [1951] 2 K.B. 948; [1951] 2 T.L.R. 526; [1951] 2 All E.R. 539; *Pasmore* v. *Whitbread & Co. Ld.* [1953] 2 W.L.R. 359; [1953] 1 All E.R. 361.

Decision of Judge Howard affirmed.

APPEAL from Judge Howard sitting at Southend County Court as a tribunal for the purpose of Part I of the Landlord and Tenant Act, 1927.[1]

The plaintiffs, Pietro Corsini and Maria Venturini, were tenants of the cellar and ground floor of premises known as 13 High Street, Southend-on-Sea, in which they carried on the business of restaurateurs. They had bought the business and goodwill on March 28, 1949, from two persons known as the Allecks. The Allecks had, themselves, carried on the business in the premises since about 1945, though they did not become tenants until 1948. They were then granted a term of four years, commencing on September 29, 1948, which they assigned to the plaintiffs on March 28, 1949.

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[1] Landlord and Tenant Act, 1927, s. 4 (1): "The tenant of a holding to "which this Part of this Act applies "shall, if a claim for the purpose is "made in the prescribed manner . . . "be entitled, at the termination of the "tenancy on quitting the holding, to "be paid by his landlord compensa-"tion for goodwill if he proves to the "satisfaction of the tribunal that by "reason of the carrying on by him "or his predecessors in title at the "premises of a trade or business for "a period of not less than five years "goodwill has become attached to the "premises. . . ."

S. 5 (1): "Where the tenant alleges "that, though he would be entitled to "compensation under the last fore-"going section, the sum which could "be awarded to him under that sec-"tion would not compensate him for "the loss of goodwill he will suffer "if he removes to and carries on his "trade or business in other premises, "he may in lieu of claiming such "compensation . . . serve on the land-"lord notice requiring a new lease of "the premises at which the trade or "business is carried on to be granted "to him."

S. 25 (1): "For the purposes of this "Act, unless the context otherwise "requires . . . the expression 'pre-"'decessor in title' in relation to a "tenant or landlord means any person "through whom the tenant or land-"lord has derived title, whether by "assignment, by will, by intestacy, "or by operation of law. . . ."

The plaintiffs claimed that, on the termination of the lease in September, 1952, they were entitled, by virtue of sections 4 (1) and 5 of the Landlord and Tenant Act, 1927, to a new lease, for, they alleged, the business had been carried on for a period of at least five years either by themselves or by their predecessors in title, the Allecks, and that, as a result, goodwill had become attached to the premises which had enhanced the rental value.

At the hearing before the county court judge, evidence was given that between 1945 and September, 1948, a leasehold interest in the premises was vested in a Miss Wren. Judge Howard found that Miss Wren sold the business fittings to the Allecks and permitted them to occupy the premises, it being understood between them that she was to remain tenant so far as the landlord was concerned but that they were to carry on the business, indemnifying her for the payment of the rent. The judge found that there was no contract between Miss Wren and the Allecks which amounted to an assignment or subletting to them of her interest in the premises.

Judge Howard held that the plaintiffs did not qualify under section 4 (1) for compensation because the persons carrying on the business or trade which had resulted in goodwill becoming attached to the premises (that is, the Allecks and the plaintiffs), had not throughout the qualifying period been carrying on the trade in the capacity of tenants. Judge Howard held that to satisfy section 4 (1) on its true meaning, the tenant must prove that either he as tenant had carried on business for five years, or that his predecessors in title in their capacity as tenants had done so, and that the period during which he as tenant and his predecessors as tenants had carried on business was not less than five years.

The plaintiffs appealed.

P. A. W. Merriton for the plaintiffs, the tenants. There was no evidence to support the judge's finding that the Allecks had no interest in the premises during the material period of 1947–48. There was no suggestion that Miss Wren's tenancy agreement contained a covenant against assigning or subletting and it is submitted that, when the Allecks purchased the goodwill and business fittings from Miss Wren, they made a firm and enforceable agreement with her, taking the benefit of her lease and the legal liability under it in such a way that they could have required her to grant them a sublease on the terms agreed.

[ROMER L.J. But if the Allecks were subtenants there must have been a reversionary term in Miss Wren and, as it is not suggested that she carried on the business, there was a break which defeats the plaintiffs' claim under the Act.]

It would be contrary to the intention of the Act to hold that a mere nominal reversion had that effect, for, if so, a tenant would be unable to sustain a claim if there had been a break for a nominal period, even though he was then negotiating for a new lease. In the present case Miss Wren was, in effect, a trustee for the Allecks.

But even if the Allecks had not a title to the premises during the vital year, the plaintiffs' claim under the section ought to succeed, for the Allecks were tenants at the time of the assignment to the plaintiffs in 1948, and they were, therefore, "predecessors in title" as defined in section 25,[1] and they had carried on business for a sufficient period in the premises when aggregated with the period assigned to the plaintiffs. The Act does not require that the "predecessor in "title" of the claimant under section 4 (1) should, throughout the material period, have had a title to the premises in which he carried on the business. A tenant to whom a title is assigned may not be able to find out whether his predecessor in title had a title throughout the period, for he cannot go behind the title assigned to him: *Lawrence* v. *Sinclair*.[2] If it were necessary to show title throughout the period, it would be difficult for the assignee of anything other than a long term ever to substantiate a claim. There is a presumption that an assignor, who was in fact carrying on business in the premises, was doing so lawfully, as in fact the Allecks were doing, and there is no need to show in what title, if any, he did so. *Pasmore* v. *Whitbread & Co. Ld.*[3] is distinguishable for in that case there was no predecessor in title, because the tenant had surrendered his lease. [Counsel referred to *Williams* v. *Portman*.[4]] It may be that the Allecks were licensees, but the nature of their interest is not material; the vital matter is that they carried on the business.

The purpose of section 4 (1) is to ensure that, if a tenant and his predecessor in title have created adherent goodwill, they should be adequately compensated. These plaintiffs have done that, and they have qualified under the wording of section 4 (1), if read literally, and an artificial meaning should not be put on the section to defeat their claim.

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[1] See note on p. 127.

[2] [1949] 2 K.B. 77; 65 T.L.R. 296; [1949] 1 All E.R. 418.

[3] [1953] 2 W.L.R. 359; [1953] 1 All E.R. 361.

[4] [1951] 2 K.B. 948; [1951] 2 T.L.R. 526; [1951] 2 All E.R. 539.

C. G. Armstrong Cowan, for the landlords, was not called on to argue the point whether the Allecks had, on the evidence, any interest in the premises from 1947–48. Throughout the statutory period the person carrying on the business must do so, as Judge Howard said, in the capacity of tenant: *Williams* v. *Portman*[4] and *Pasmore* v. *Whitbread & Co. Ld.*[5] To qualify, the predecessor in title must be a person who, in relation to the landlord, has a right to possession of the premises. The period during which the Allecks were carrying on business at the place prior to the grant of the tenancy to them must be ignored for, until the grant of the tenancy, they were not the plaintiffs' "predecessors "in title." It is not sufficient, for example, to show that a claimant had for part of the material period been a manager of a business subsequently carried on by him as tenant. The position is the same if, during the material period, a person carrying on the business acquires a tenancy of the premises and then assigns the term. The section is not satisfied unless both the claimant and his predecessor in title have carried on business in the premises for at least five years in the capacity of tenants, and, by reason of carrying on in that capacity, goodwill has become attached to the premises. The whole Act is based on the relationship of landlord and tenant.

Merriton in reply. Where the claimant is the person who has carried on business for the whole of the statutory period, he may possibly have to show his title for all of that period, but that type of case is distinguishable from the case where the basis for the claim is an aggregated period of five years of a tenant and his predecessor in title. Then, as in this case, the claimant tenant is not called on to show in what title his predecessor in title carried on the business. All that he has to show is that the person carrying on the business in the premises for the requisite period is his predecessor in title.

Evershed M.R. stated the facts, referred to sections 4 (1), 5 (1) and 25 of the Act of 1927, and continued: The Allecks had themselves carried on the business during the whole period of the lease, that is, from September 29, 1948, until its assignment to the plaintiffs and it is therefore plain that unless the plaintiffs can, so to speak, carry the matter at least one year further back they have not brought themselves within the terms of section 4—in particular they have not satisfied the requirement of a five years period. The plaintiffs in the county court attempted to establish that the Allecks had acquired Miss Wren's interest or had become her subtenants at least for one year prior to September, 1948. On that matter Judge Howard concluded: "I do not think on the evidence that there was any intention between Miss Wren and the Allecks to form any binding "or legal contract except as to fittings. It was a friendly "understanding to avoid legal formalities. They did not risk "informing the landlord and it was simply understood that "Miss Wren was to remain tenant only as far as the landlord "was concerned, that they were to run the business and that "they were to indemnify her against the rent. This is not a "subletting or an assignment." I need not pursue this point. Mr. Merriton, for the plaintiffs, submitted that there was no evidence to support that adverse conclusion. He referred us to the judge's notes of the testimony of two witnesses, a Mrs. Livingstone and one Luigi Bertorelli, who was a brother-in-law of Miss Wren, and who had, himself, been actively concerned in the management of the business. In my judgment, it is manifest that there was some evidence on which the judge could hold, as he did, that there was never any legal contractual relationship which constituted or could be regarded as the equivalent of an assignment or an under-letting between Miss Wren and the Allecks. Bertorelli's evidence was to the effect that Miss Wren said that she would not assign the agreement or give any agreement to Mr. Alleck as she expected herself to have a long lease after the three years: he said that she would not enter into any legal document for she meant to carry on herself afterwards. If that piece of evidence is correct, it shows (and it is not unimportant as a background of the later point that Mr. Merriton argued) that Miss Wren, who appears to have had a term of three years or the equivalent of such a term, was desirous of appropriating to herself, if she could, any benefit which might accrue from the conducting by the Allecks of this business on the premises.

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[4] [1951] 2 K.B. 948; [1951] 2 T.L.R. 526; [1951] 2 All E.R. 539.

[5] [1953] 2 W.L.R. 359.

Mr. Merriton has taken a second point of some nicety, simplicity and ingenuity. In March, 1949, the plaintiffs acquired by purchase from the Allecks the outstanding part of the lease of four years which was due to expire in 1952. The Allecks were undoubtedly the plaintiffs' predecessors in title.

Mr. Merriton says that the section is satisfied if the Allecks carried on the business (as they did) before 1948, whether before that date they had any interest in the premises or not. He submits that the section must be read, applying well-known principles, according to the ordinary sense of the language used. The requirement is that the tenant should prove that "by reason "of the carrying on by him or his predecessors in title at the "premises of a trade or business . . ." he has a claim. It is not in doubt that the period during which the predecessor in title has carried on the business may be aggregated with the period during which the tenant himself has carried on the same business. Mr. Merriton says that it was proved that either the tenants (the plaintiffs) or their predecessors in title (the Allecks) carried on the business for five years. In other words, and substituting names for the descriptions in section 4 (1), Mr. Merriton seeks to read the section as follows: "if he proves that by "reason of the carrying on by the plaintiffs or by the Allecks "at the premises of a trade or business. . . ." That is a simple and not unattractive point, but I have come to the conclusion that it is incorrect.

I conclude, with Judge Howard, that the plain sense of the language of section 4 (1) is to require that the persons who carried on this business before the tenants did so must have been the tenants' predecessors in title and must have carried on the business *as tenants*, that is, as having an interest in the premises during the whole of the relevant period. It seems to me that any other view would lead to an extraordinary result; it would, in effect, be inconsequent that the persons who carried the business on before the tenant should have had at any time any interest in the premises. It is plain, and it has, indeed, been laid down by this court in *Williams* v. *Portman* [1] and, more recently, in *Pasmore* v. *Whitbread & Co. Ld.*,[2] that the phrase "predecessors in title," having regard particularly to section 25, the definition section, means predecessors in title of the premises, that is, persons who had the title to the premises to which the tenant has succeeded.

It, therefore, follows that persons carrying on the business previously to the tenant must have had an interest in the premises immediately before the tenant took over. It would be illogical and capricious if they were only required to have had the interest at that time or for a period, however short, immediately prior thereto but were not required to have had any interest in the premises throughout the whole of the relevant period during which they carried on business. It is true that the section is concerned with the provision of compensation for goodwill (or its equivalent), but the goodwill is what is called an adherent goodwill, that is, goodwill which has become attached to the premises so as to give them a particular and increased value in the market. It seems to me that the logic of the section requires the combination both of a title in the premises and of conduct of the business in order that the purposes of the Act may be satisfied. The point is very short and does not require elaboration. I concur with and adopt the way in which Judge Howard expressed his conclusion: "I "think," he said, "that, on its true meaning, the section "means that the tenant must prove either that he as tenant "has carried on business for five years, or that his predecessors "in title in their capacity as tenants have carried on the business, "and that the period during which he as tenant and the "predecessors as tenants have carried on business is not less "than five years." That, in my judgment, is a correct statement of the meaning of the section, and I am, therefore, unable to accept Mr. Merriton's contention to the contrary.

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[1] [1951] 2 K.B. 948; [1951] 2 T.L.R. 526; [1951] 2 All E.R. 539.

[2] [1953] 2 W.L.R. 359; [1953] 1 All E.R. 361.

This appeal fails and must be dismissed.

Birkett L.J. I am of the same opinion. Not only do I agree with the judgment of the Master of the Rolls, but I agree with the admirable judgment of Judge Howard, and particularly with the passage which has been already quoted by my Lord, in which Judge Howard summarized the point in this case. I agree that this appeal ought to be dismissed.

Romer L.J. I also agree and only add a few words on the second point. The submission for the plaintiffs is, in effect, that provided only that the predecessor of a tenant who makes a claim under section 4 of the Act had a title to the premises, and that that title could and did devolve on the tenant, it does not matter, for the purpose of fulfilling the five year requirement, which is referred to in the section, when the predecessor first acquired his title to the premises; that it is enough to show that he was in actual occupation (and, as to that, I am not sure whether such occupation must be lawful or whether an unlawful occupation of the premises would be sufficient); and

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that he carried on the relevant business for the requisite time. In my judgment, that view attributes insufficient weight to the two words "in title" which follow upon the word "predecessors." I think that when the legislature speaks of predecessors "in title" in this context, those words must be attached to the word "predecessor" as a qualification throughout the whole period which is mentioned immediately afterwards.

For the purposes of the five year period the legislature might have looked to title alone, or (conceivably) to occupation alone. But according to the plaintiffs' argument, they looked to title alone at the date of the devolution from the predecessor of the tenant and also subsequently, but were content to look to either title or occupation indifferently at the earlier period of the predecessor's possession. That seems to me to be inherently improbable, and if the legislature thought that mere occupation in conjunction with user were sufficient to form a foundation for a tenant's claim under section 4, it is not easy to see why they insisted on the possession of title at the time of devolution to the tenant. One would have thought that occupation would, on that hypothesis, have been a sufficient qualification both at that point of time and earlier. Accordingly, as I have already said, I think that the words "in title" cover the whole five year period, and that on its true meaning the section means what Judge Howard said it meant: "that the "tenant must prove either that he as tenant has carried on "business for five years, or that his predecessors in title in their "capacity as tenants have carried on the business." I agree with that. It has to be remembered that this is a landlord and tenant Act, and it is not easy to see, as a matter of logic or reason, why there should be introduced into it an element which arose out of the possession of some person who was not a tenant at all, and that was the position of the Allecks in the present case before September, 1948. I agree with my Lord that to sustain a claim under this section it must be shown that there was a continuous chain of title throughout the period of five years to which the section refers.

I agree that the appeal must be dismissed.

Appeal dismissed.

Solicitors: *Conway & Conway; Warren, Murton & Co. for H. A. Dodman, Leeds.*

E. D.

ELLIS *v.* HOME OFFICE.

[1950 E. No. 1795.]

C. A.

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May 8, 13, 14.

Singleton, Jenkins and Morris L.JJ.

Crown—Privilege—Evidence—Police reports and other documents falling within privileged class—Public interest—Interests of justice—Procedure where no question of danger to public interest involved.

While it is essential that responsible government departments should be entitled to claim privilege for documents the disclosure of which would be against the public interest, and that the decision of the responsible minister in respect of any particular document should be final, it is desirable in the interests of justice that documents coming within the ambit of privilege should be most carefully scrutinized and that the person entrusted with that task should, in regard to each document, consider whether the harm done to the public interest by disclosure is sufficient to outweigh the hampering or impeding of a plaintiff's case if that evidence is not made available.

Per Singleton L.J.: It seems to me that it is desirable, in a case such as this, that there should be disclosure and production of documents which cannot harm the public interest, and that each individual document should be examined before a claim of privilege is made.

Per Jenkins L.J.: Where there is a large number of relevant documents within the ambit of privilege which may become of real materiality to the case as it develops, there should be someone on the spot readily available—whether counsel or solicitor or an official from the department concerned—invested with authority to consider questions of privilege which may arise in the course of the case, and in his discretion to waive the claim of privilege. It should be possible for the question to be disposed of in the course of the trial without the delay imposed by reference back to the minister.

Per Morris L.J.: It seems to me that when considering the public interest and what might be injurious to it, it is to be remembered that one feature and one facet of the public interest is that justice should always be done and should be seen to be done.

APPEAL from Devlin J., sitting at Winchester Assizes.

The plaintiff, William Henry Berwyn Ellis, claimed damages for injuries suffered by him through the alleged negligence of persons employed under the defendants, the Home Office. Alternatively, he claimed damages for breach of the duty which the defendants owed to him under the Prison Rules.

On July 22, 1949, the plaintiff was in Winchester Prison, having been committed there for trial. It was thought that he was suffering from some illness and he was accordingly placed in the hospital wing of the prison. On the morning in question, at about 7 o'clock, the doors of the cubicles were unlocked to enable the prisoners to empty their slops. There were usually two warders on duty, and the practice was to open only about nine doors at a time, but on the morning in question there was only one warder on duty and he opened all the doors, some thirty-six, at one time. In those circumstances, while the warder was absent from the corridor for a purpose which was not explained, someone entered the plaintiff's cubicle and struck him two violent blows on the back of the head, causing him very severe injury. According to the medical evidence the injury was inflicted by an instrument, but no instrument would appear to have been found. The police were notified, and in the afternoon searched for a weapon and also questioned and took statements from possible witnesses. Some time later a convicted prisoner named Hammill pleaded guilty to the assault. He had been put back from Southampton quarter sessions, after conviction, for observation as a possible mental defective.

At the trial of the present action the Home Office claimed privilege, inter alia, for the police reports and the medical reports on the behaviour of Hammill before the assault on Ellis, and Devlin J., while dismissing the action, expressed grave concern at the fact that the plaintiff was in the unfortunate position of being quite unable to test the evidence as to Hammill's behaviour, the facts of which were known only to the prison authorities.

The plaintiff appealed.

Scott Henderson Q.C. and *Starforth Hill* for the plaintiff.
Kenneth Diplock Q.C. and *E. S. Fay* for the Home Office.

The case is reported only on the question of Crown privilege.

Singleton L.J., having stated the facts, said that upon the evidence before the court and the case as pleaded the findings of Devlin J. were right and were sufficient to dispose of the appeal. He continued:—Devlin J. felt grave concern about this case from the point of view of the evidence as to the behaviour of Hammill. In his judgment he said: "The plaintiff is in the unfortunate "position that he has been quite unable to test that evidence in "any way at all. The facts relating to Hammill's behaviour in "prison are known only to the prison authorities. Documents, "of course, are brought into existence in relation to that; the "hospital officers prepare a daily report in which, of course, it "would be their business to note down anything with regard to

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Singleton L.J.

"Hammill which was significant, because he was put in the "C.2 wing in order that he might be kept under observation. "Those reports, if they were examined, might or might not show "something which would lead a medical man to suppose that "Hammill's conduct ought to have given rise to a suspicion of "violence. Those reports are not before the court because the "defendants—who are, of course, also the Crown—have claimed "Crown privilege for them, and that claim has not been challenged. Having regard to the case of *Duncan* v. *Cammell* "*Laird & Co.*,[1] I suppose it could not be sensibly challenged. I "therefore have to look at the case upon the material that is "before me; I have to regard this case in precisely the same "position as if the documents which would have enabled the "plaintiff to test the evidence of the defendants' witnesses had "been destroyed. That would be a misfortune which they would "have to put up with as best they could, but it is, of course, a "worse misfortune than that, because not merely are the "documents to be regarded as having been destroyed, but no "secondary evidence can be given of their contents, so that they "must be treated, therefore, as being obliterated from everyone's "memory. But that is what the law requires, and in those "circumstances I can only act upon the evidence which I have "got. I must not assume that anything that is contained in the "documents would have caused Dr. Fenton [Prison Medical "Officer] under cross-examination to alter his opinion or would "have enabled the plaintiff to throw another light on the matter."

Having stated his conclusion, the judge said this: "But "before I leave this case I must express, as I have expressed "during the hearing of the case, my uneasy feeling that justice "may not have been done because the material before me was "not complete, and something more than an uneasy feeling "that, whether justice has been done or not, it certainly will "not appear to have been done." That is a serious thing for a judge to have to say as to the administration of justice in his court.

Devlin J. continued: "This case, as I have said, turns "entirely upon the cardinal fact of whether the prison doctor "had any reason to believe that Hammill, a mental defective, "was likely to commit violence. There is no doubt that daily "reports would have been prepared by the hospital orderlies,

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[1] [1942] A.C. 624; 58 T.L.R. 242; [1942] 1 All E.R. 587.

"while Hammill was confined for some considerable time in the "hospital wing, recording anything that was material about him. "Dr. Fenton has no doubt examined those records, and, well, "we do not know what they are. I have no reason at all to "suppose, and it has not been suggested, that he has expressed "an opinion—that is, has knowingly expressed an opinion—"which is inconsistent with those records; but it does mean "that his opinion cannot be tested in cross-examination in the "way in which it ordinarily is tested. There may, for example, "be incidents recorded which Dr. Fenton has regarded as of no "significance, and which another doctor might have considered "of significance, and had there been a conflict of medical "evidence on the point, it might be that I would have preferred "that other doctor's evidence to that of Dr. Fenton."

The judge continued: "It is a rule, of course, which is "particularly unfortunate when the person who is responsible for "deciding whether they should be disclosed or not happens also "to be the defendant in the action in which he is being sued. It "means that every litigant against a government department—"and such litigation is becoming more and more frequent as the "sphere of government activities is extended—is denied, as a "matter of course, the elementary right of checking the evidence "of government witnesses against the contemporary documents. "Dr. Fenton, for example, made an examination of the prisoner, "Hammill, in June, and he prepared, I am told—and no doubt "it is the case—case notes, which, of course, in the ordinary "case the plaintiff would want to look at so as to check his "evidence. They come among the documents that are privileged "from disclosure, as has all the material to which I have already "referred, the reports which were made by the hospital officers "in the C.2 wing."

Thus we have the trial judge left with a feeling of dissatisfaction, and that is not as it should be. Over and above the reports on Hammill for which privilege was claimed, a further claim of privilege was made in respect of a report submitted on June 22, 1950, to the Chief Constable of Hampshire: "Statements of "witnesses and photographs taken by the Hampshire Constabulary, July 22 to August 5, 1949." The Secretary of State had sworn an affidavit in which he deposed to the fact that the Standing Orders for the Government of Prisons, included in the third part of the first schedule of documents, were documents in respect of which he claimed privilege, he having formed the view on the grounds of public interest that those Standing Orders ought not to be produced. No one, I am sure, will say a word against that claim. It is of great importance that privilege should be maintained when the public interest is at stake.

Some time after that affidavit had been put upon the file, the Treasury Solicitor wrote to the solicitor for the plaintiff asking if an affidavit was required in respect of other documents for which privilege was claimed, and there were many of them. I have referred to two classes: (1) the reports on Hammill, and (2) police reports. The solicitor for the plaintiff did not require another affidavit. I am inclined to think that if a further affidavit had been required, more thought would have been given to this matter than appears to have been given at one stage. Everyone agrees that a government department, particularly the Home Office, is charged with a multiplicity of duties, and its officers must have possession of numbers of documents production of which would be against the public interest.

But let me consider the police documents in this case. It was 3.50 p.m. on July 22 when the police were called in. I have no doubt that they took a number of statements from people who might be witnesses. I have no doubt that they searched. I have no means of knowing what they found. I should assume they found nothing, but the judge at the trial might have been helped if he had had before him the result of the police inquiries when they were called in in this matter. I dare say that Hammill was asked questions other than those which we see recorded upon the depositions in his case. It may be that there was a little jealousy in the prison because Hammill, the convicted man, had not as much tobacco as he liked, whereas Ellis, the man who had not been convicted, had a better supply. The question of tobacco is mentioned in two places in the evidence or documents which we have seen.

Counsel for the plaintiff did not go fully into the question of police documents. It was thought, apparently, that they were covered by the claim of privilege. But a most peculiar incident occurred in the course of the trial, and that was on the first day, when a witness named Hutton gave evidence. Hutton was another prisoner in the hospital wing. He had given his account of what had happened three and a half or four years earlier. He was cross-examined by Mr. MacKenna, who then appeared for the Home Office, and this appears in the transcript of the first day's evidence. Hutton was asked about the deposition which he had made at the time when Hammill was committed for trial. Part of his deposition was read to him. He was asked: "That is very "different, is it not, from the evidence which you have given "today?" and he answered: "In regard to that it is a long "time really, to go back in regard to this part here, because this "evidence I gave happened to be on the spot of a matter of "twelve hours, when that evidence was given. The evidence I "have given now is three and a half years. It is a long time to "look into the case as regards evidence in between now." Mr. MacKenna asked again: "You think that you may have forgotten "really what happened. (A.) That is really what I am trying to "explain with regard to that. That is twelve hours old. Not "twelve hours, because I was testified by the police there that "same day, that same evening between the hours of 6 o'clock "and 8 o'clock at night, whereas this evidence is three and a "half years old. It is a long time to go back."

Mr. MacKenna proceeded to ask Hutton about a statement which he had made to some solicitors for the purpose of this case; he read that to him, and the witness said that he did make that statement. Neither the deposition nor that statement was in complete accord with what Hutton had said in his evidence-in-chief, and the cross-examination was intended to cast doubt upon him and upon the worth of his evidence. He said: "But I gave "an account twelve hours afterwards. I testified twelve hours "afterwards." Accordingly, Mr. Scott Henderson asked him in re-examination: "You say that that very day you made a state-"ment to the police officer? (A.) Which one do you mean? "(Q.) Did you see the police after this man Ellis had been "attacked? (A.) You mean 1949? (Q.) Yes. (A.) I was brought "out by one of the officers, I believe, to see a detective in the "prison in one of the cells there to give this evidence. (Q.) Did "he take down in writing what you said? Did you sign a state-"ment at that time? (A.) I do not know that I can remember." Mr. Scott Henderson: "I call for this witness's statement, if "there is one." The witness: "It is a long time to go back to, "to three and a half years." Mr. MacKenna: "My Lord, I "believe that a claim of privilege has been made for the state-"ments that were made at this time, on the ground that those "statements were taken in circumstances where the Crown does "not disclose the statements that were made. But I am sorry "that the claim has been made, because one would like the "document to be produced at once to my learned friend." There was then a discussion, and at the end Mr. Scott Henderson said, I think, that he would not pursue the matter lest it should cause difficulty with the Home Office—I forget the exact words—and that statement was not before the judge. Objection was taken to its production on the ground of privilege.

The judge did not form a very good view of the evidence of Hutton. I am not sure that he would have formed any better view if he had seen the statement which Mr. Scott Henderson called for. But I am surprised that objection was taken. I cannot conceive that it served any good purpose. I do not intend this as criticism of anyone, for I know that the law in regard to privilege is not always easy to follow. But if there be two statements—the deposition and the later statement made not long before this trial—on which a witness for the plaintiff is cross-examined, and if he himself says: "I testified twelve hours after "the happening," and if he wants to see that to refresh his memory, and if counsel for the plaintiff wants the witness and the judge to see it, I have no doubt whatever in my mind that it ought to be produced. If it is not, the judge is not in as good a position to form a view upon the witness as he would be if he had seen it. I go further, and I say that the administration of the law will become impossible if that attitude is adopted.

Counsel for the defendants thought it his duty to draw attention to the fact that this was one of the documents for which privilege was claimed. I appreciate the difficulty, though if a position such as that arises it ought, I think, to be clear to counsel on both sides that it is impossible for justice to appear to be done if the witness who wanted to see his statement, made twelve hours after the occurrence, was not allowed to have it.

I wondered what the result might have been and therefore, today, after consultation with the other members of the court, I asked Mr. Diplock how long it would take him to get the necessary authority to show the document to Mr. Scott Henderson. Mr. Diplock said that it might take a little time, so the court adjourned. It appeared that this had not been considered. In the case of a claim of privilege made on behalf of the Home Office, we are told, the Senior Permanent Official of the Department has seen every document. When I am told that by counsel, of course I accept it. After the adjournment Mr. Diplock, having obtained the consent which he regarded as sufficient, showed the document to Mr. Scott Henderson. There is nothing in it. We all thought that there might not be. I assume that Mr. MacKenna had not seen it. There was no reason why it should not have been produced, nothing which could affect the public interest in any degree.

I suppose that if the claim of privilege is made in these wide terms, it may be difficult for counsel, but I think that the document should have been produced; a good deal of time would have been saved, and some of the anxiety of the judge would have been avoided. That is one document. There are others resulting from the police inquiries generally. I do not think that any harm would be done to the public interest by allowing the plaintiff in a case such as this to see the result of the police inquiries or—if it is not thought right that he should have the original statements, or copies of them—to let him have what Mr. Fay described as an abstract. It is true that an abstract was not asked for because the plaintiff's solicitor regarded himself as faced with the claim of privilege.

The major claim of privilege covered documents which were in the nature of reports on the prisoner Hammill. I have not seen those reports, and I ought not to express an opinion upon them. But one thing which the courts in this country have sought to make clear, generation after generation, is that there ought to be fair play. I know that the responsible officials in the Home Office desire that; but the danger is that if a claim of privilege is made in the wide terms in which it was made in this case, it prevents anything being shown, and so one side has all the advantages, and the other side is deprived of something which it might have without any danger whatever to the public weal.

This was an anxious, and a troublesome, case. The plaintiff was a man awaiting trial who suffered a grievous injury. He received some sentence the following December, when he was fit to undergo his trial. He came out of prison. He obtained occupation for which it was found that he was not medically fit. He fell into crime again, and he received a long sentence—I think seven years' imprisonment.

After the judge had decided against Ellis, Mr. Scott Henderson asked the judge to assess damages provisionally, and Devlin J. said that in the event of there being a successful appeal he thought that the damages ought to be £300. They were less than they might have been because the plaintiff had been a prisoner most of the time. He had not lost anything in that sense, and he had, of course, been looked after in hospital; indeed, he had all the attention possible from the first moment. He had been taken to the prison hospital at Winchester, then to another hospital in Winchester, and later to the Radcliffe Infirmary at Oxford, where he was operated upon. He still has a hole in the back of his head. It is a serious injury.

The desire of every court, above all things, is that every litigant should have a fair chance and appear to have a fair chance. If Devlin J. at the end of this case had an unsatisfactory feeling, the position was not such as every judge and every good citizen likes it to be. Let me make clear that I am not saying there was the slightest desire on the part of anyone in or around the Home Office to be unfair in any sense of the word. I know it is not so. The danger is the wide claim of privilege without consideration of individual documents.

The matter was dealt with in the speech of Lord Simon L.C. in *Duncan* v. *Cammell Laird & Co.*[2] The law then was not quite the same as it is now because of the statute which has been passed since, though that, in effect, only reproduces the practice. The Crown Proceedings Act of 1947, by section 28 (1), provides: "Subject to and in accordance with rules of court and county "court rules:—(*a*) in any civil proceedings in the High Court or "a county court to which the Crown is a party, the Crown may "be required by the court to make discovery of documents and "produce documents for inspection." Until that time the Crown was not bound to give discovery. "(*b*) In any such proceedings "as aforesaid, the Crown may be required by the court to answer "interrogatories: Provided that this section shall be without "prejudice to any rule of law which authorizes or requires the "withholding of any document or the refusal to answer any "question on the ground that the disclosure of the document or "the answering of the question would be injurious to the public "interest. Any order of the court made under the powers con-"ferred by paragraph (*b*) of this subsection shall direct by what "officer of the Crown the interrogatories are to be answered. "(2) Without prejudice to the proviso to the preceding sub-"section, any rules made for the purposes of this section shall "be such as to secure that the existence of a document will not "be disclosed if, in the opinion of a Minister of the Crown, it "would be injurious to the public interest to disclose the "existence thereof."

It is clear that the public interest is that which counts. In *Duncan* v. *Cammell Laird & Co.*[2] it was shown that the claim by the responsible minister of privilege for documents might be put on two grounds. The Lord Chancellor said[3]: "This test "may be found to be satisfied either (*a*) by having regard to the "contents of the particular document, or (*b*) by the fact that "the document belongs to a class which, on grounds of public "interest, must as a class be withheld from production." And so it is said here by counsel representing the Home Office that both these classes of documents belong to a class which, on the ground of public interest, "must as a class be withheld from "production." This case shows how wide an interpretation may be put on the words of Lord Simon. It seems to me that it is desirable, in a case such as this, that there should be disclosure and production of documents which cannot harm the public interest, and that each individual document should be examined before a claim of privilege is made.

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[2] [1942] A.C. 624, 636.

The Lord Chancellor cited *Admiralty Commissioners* v. *Aberdeen Steam Trawling and Fishing Co. Ld.*[4] and the words of Lord Dunedin (then Lord President)[5]: "It seems to me that "if a public department comes forward and says that the pro- "duction of a document is detrimental to the public service, it "is a very strong step indeed for the court to overrule that "statement by the department." Here the plaintiff's advisers were faced with a claim that both classes of documents to which I have referred were of a kind which it would be injurious to the public interest to produce, and they were not produced. The Lord Chancellor also said this[6]: "Where the Crown is a party "to a suit, therefore, discovery of documents cannot be demanded "from it as a right, though in practice, for reasons of fairness "and in the interests of justice, all proper disclosure and "production would be made."

I cannot help feeling that if this question had been considered in all its implications, both in regard to police documents and in regard to hospital reports, it might well have been found that the disclosure of most of them could not have been fraught with any danger to the public interest, while it would have been desirable that they should be disclosed to the advisers of this injured plaintiff for reasons of fairness and in the interests of justice.

I have taken some little time to express my opinion in a case which is not without importance. If it be necessary every time a document is required by the plaintiff—such as the document in the case of the witness Hutton—that a request has to be made to the Secretary of State or the Permanent Head of the Department for that document, endless delay will be caused in litigation. I cannot believe it was necessary, for the reasons I have given, and, above all, because the one who had made the statement (Hutton) wanted to see it to refresh his memory, to see how far counsel was right or wrong in suggesting that his memory was unreliable. I cannot see any reason why that document should not have been produced.

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[3] Ibid. 636.

[4] 1909 S.C. 335.

[5] Ibid. 340.

[6] [1942] A.C. 624, 633.

For the reasons which I have given, I feel that this court can only say that, on the findings of the judge, the appeal must be dismissed.

JENKINS L.J. I agree. I confess to great sympathy for the unfortunate plaintiff who, while detained as a remand prisoner in Her Majesty's prison at Winchester, was the victim of a brutal and apparently entirely unprovoked attack by a fellow prisoner, Hammill, from which he sustained serious injuries. But the mere fact that the plaintiff, while in prison, was attacked and injured by a fellow prisoner does not entitle him to succeed against the government department responsible for the management of the prison, that is to say, the Home Office. He must show that the injury which he sustained was due to some breach of duty on the part of those responsible for the management of the prison.

This it has been sought to do in two ways. First, it is said that the injury was caused and brought about by the negligence of the defendants, their servants or agents. Secondly, it is said that the injury arose from breach of the defendants' statutory duty under certain paragraphs or sections of the Prison Rules of 1949. I entirely agree with the judge that the claim based on breach of the Prison Rules will not stand. There remains the claim for negligence at common law. In my view on the judge's finding of fact this claim must fail, and it would be wrong for us sitting in appeal to disturb his conclusions.

On the question of privileged documents, to which my Lord has referred, I would only add this: it is clearly essential in the public interest that responsible government departments should be entitled to claim privilege for documents the disclosure of which would be against the public interest; and it is clearly right that the decision of the responsible minister on the question whether privilege should be insisted upon or not in respect of any particular document should be final. But I would urge that in the interests of justice—particularly in a case like the present, which concerns a claim by one of Her Majesty's subjects against a government department—documents within the ambit of privilege should be most carefully scrutinized, and the person entrusted with that task should, in regard to each document, ask himself whether it is relevant to the plaintiff's case, whether the plaintiff's case will be hampered or impeded if it is not made available, and, if so, whether the probability of any harm being done to the public interest by disclosing it is sufficient to out-weigh those other considerations.

I also think that in a case of this sort, where there is a large number of relevant documents within the ambit of privilege which may or may not become of real materiality to the case as it develops, there should be someone on the spot readily available —whether counsel or solicitor on the government side or an official from the department concerned—invested with authority to consider questions of privilege which may arise in the course of the case, and in his discretion to waive the claim of privilege. That, of course, would not apply to documents which from the outset appear to be such that they should on no account be disclosed for reasons of public interest. But in the case of ordinary documents (such as those in question in the present case) the disclosure of which could not apparently do any harm to anybody, I certainly think that it should be possible for the question to be disposed of in the course of the trial of an action without the delay imposed by reference back to the minister.

I agree with my Lord that the appeal fails, and should be dismissed.

Morris L.J. I have reached the same conclusion. I fully agree with what has been said in regard to the great importance of the duties which devolve upon Ministers of the Crown when they have to consider the subject of privilege. At such times, as Ministers of the Crown and as servants of the public, they have to do their best to secure the interests of the public. In his speech in *Duncan* v. *Cammell Laird & Co.*[7] Lord Simon used these words: "After all, the public interest is also the interest "of every subject of the realm, and while, in these exceptional "cases, the private citizen may seem to be denied what is to his "immediate advantage, he, like the rest of us, would suffer if

[7] [1942] A.C. 624, 643.

"the needs of protecting the interests of the country as a whole "were not ranked as a prior obligation."

When considering the public interest, and when considering what might be "injurious to the public interest," it seems to me that it is to be remembered that one feature and one facet of the public interest is that justice should always be done and should be seen to be done. It is, indeed, unfortunate in any case—unless considerations of public interest when weighed in the balance demand it—if it should appear that any document which might conceivably have assisted a party to the litigation should not be available. A Minister has the anxious and arduous and responsible task of deciding whether disclosure would be against the public interest. When he decides, his decision is final. But it is, I think, one element of the public interest that regard should be had to the due administration of justice in such manner that it should always be done, and should be seen to be done.

Appeal dismissed.
Leave to appeal to House of Lords refused.

Solicitors: *G. & G. Keith, for A. J. Bowker, Winchester; Treasury Solicitor.*

A. W. G.

REGINA v. FULHAM, HAMMERSMITH AND KENSINGTON RENT TRIBUNAL. *Ex parte* HIEROWSKI.

1953
Apr. 21.

Lord Goddard C.J., Lynskey and Parker JJ.

Landlord and Tenant—Rent tribunal—Furnished premises—Application for reconsideration of rent—Change of circumstances—Jurisdiction of tribunal—Furnished Houses (Rent Control) Act, 1946 (9 & 10 *Geo.* 6, *c.* 34), *s.* 2 (3).

The tenant of a furnished flat, the rent of which had, unknown to him, been determined by a rent tribunal on a reference by a previous tenant and registered, referred his contract to the tribunal. The tenant alleged no change of circumstances, but the landlord, in answer, set out an increase in outgoings. The tribunal reduced the rent of the flat on the ground that the increase in outgoings provided a change of circumstances enabling the tribunal to reconsider and reduce the rent. The landlord moved for an order of certiorari:—

[Reported by MISS ELAINE JONES, Barrister-at-Law.]

1953

REGINA
v.
FULHAM,
HAMMERSMITH AND
KENSINGTON
RENT
TRIBUNAL.
Ex parte
HIEROWSKI.

Held, granting the application, that (1) a tribunal acting under the Furnished Houses (Rent Control) Act, 1946, had jurisdiction under section 2 (3) of the Act to reconsider a rent already determined only on the ground of change of circumstances.

Rex v. *Fulham, Hammersmith and Kensington Rent Tribunal; Ex p. Gormly* [1952] 1 K.B. 179; [1951] 2 T.L.R. 1037; [1951] 2 All E.R. 1030 followed.

(2) That the tribunal had power to consider any changes of circumstances alleged and were not limited to those put forward by the applicant. The tribunal were, however, limited to considering the change of circumstances only, and were not entitled to consider the whole case de novo and thereby review a decision which they believed to be wrong.

APPLICATION for an order of certiorari.

The landlord of premises at No. 100 Masbro Road, London, W.14., one S. W. Hierowski, let a furnished flat to a tenant, S. S. Szlafarski, at a weekly rent of £7. The tenant referred the contract under the provisions of the Furnished Houses (Rent Control) Act, 1946,[1] to the Fulham, Hammersmith and Kensington Rent Tribunal which, on June 27, 1949, reduced the rent to six guineas a week, and that rent was entered on the register of the local authority.

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[1] Furnished Houses (Rent Control) Act, 1946, s. 2: "(1) Where a "contract has, . . . been entered into "whereby . . . [the lessor] grants "to . . . [the lessee] the right to "occupy as a residence a house or "part of a house . . . in consideration "of a rent which includes payment for "the use of furniture or for services, ". . . it shall be lawful for either "party to the contract or for the local "authority to refer the contract to "the tribunal for the district, and "where any such contract . . . is so "referred to the tribunal, they may "by a notice in writing served on the "lessor require him to give to them, ". . . such information as they may "reasonably require regarding such "of the prescribed particulars relating "to the contract as are specified in "the notice.

"(2) Where any contract to which "this Act applies is referred to a "tribunal, . . . the tribunal shall "consider it and, after making such "inquiry as they think fit, and giving "to each party . . . an opportunity "of being heard, . . . shall approve "the rent payable under the contract or reduce it to such sum as "they may, in all the circumstances, "think reasonable, or may, . . . dismiss the reference. . . .

"(3) Where the rent payable for "any premises has been entered in "the register in accordance with the "provisions hereinafter contained, it "shall be lawful for the lessor or the "lessee or the local authority to refer "the case to the tribunal for reconsideration of the rent so entered on "the ground of change of circumstances, and the provisions of subsection (2) of this section shall apply "on any such reference in like "manner as they apply on a reference under subsection (1) of this "section subject to the modification "that the tribunal shall have power "to increase the rent payable."

S. 3 (1): "The local authority shall "prepare and keep up to date a "register for the purposes of this Act, "and shall make the register available for inspection in such place or "places and in such manner as the "Minister may direct."

In October, 1952, a new tenant of the furnished flat, E. N. Ukpoma, unaware that the rent had been determined by the tribunal and registered, referred his contract to the tribunal. He alleged no change of circumstances in support of his reference, but the landlord, in answer, set out an increase in rates and certain other outgoings.

At the hearing of the reference on December 12, 1952, the tribunal further reduced the rent of the furnished flat to four and a-half guineas a week on two grounds. The ground relevant to this report was that the increase in outgoings referred to by the landlord provided a change of circumstances enabling the tribunal to reconsider and reduce the rent.

The landlord moved for an order of certiorari to bring up and quash the decision of the tribunal.

D. Ackner for the applicant. Section 2 (3) of the statute entitles a tribunal to alter a rent, which has already been determined, if there has been a change of circumstances. The words "... on the ground of change of circumstances ..." in the subsection import that the tribunal can only act when there has been a change of circumstances and can then, in making a decision, only take the new circumstances into account. Were the submission correct that a tribunal which has jurisdiction to reconsider the rent may reconsider the whole case all over again, it would constitute the tribunal a court of appeal for determinations of rent made by them years before. This cannot have been the intention of the legislature.

J. P. Ashworth for the rent tribunal. The persons entitled to refer under section 2 (3) are the lessor, the lessee or the local authority. They can refer the whole case to the tribunal for a reconsideration, as opposed to an adjustment, of the rent. The tribunal has jurisdiction only if there has been a change of circumstances (*Rex* v. *Fulham, Hammersmith and Kensington Rent Tribunal; Ex parte Gormly* [2]), but the change of circumstances need not be one which affects the person making the application or which enures to his benefit. Once jurisdiction has been so conferred, the tribunal is entitled to reconsider the whole case. The incorporation of the provisions of subsection (2) into subsection (3) supports this submission. No other provision has been made whereby tribunals are enabled to correct errors in determining rents, and if subsection (3) is ineffective for this purpose there would be a great omission in the statute.

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[2] [1952] 1 K.B. 179; [1951] 2 T.L.R. 1037; [1951] 2 All E.R. 1030.

Lord Goddard C.J. In this case the applicant moves for a writ of certiorari directed to the Fulham, Hammersmith and Kensington Rent Tribunal to bring up and quash a determination by which the tribunal reduced a registered rent from six guineas to four and a-half guineas a week. [His Lordship stated the facts, referred to section 2 (3) of the Furnished Houses (Rent Control) Act, 1946, and continued:] The only words we need consider are: " . . . it shall be lawful for the lessor or the lessee or the local " authority to refer the case to the tribunal for reconsideration " of the rent so entered on the ground of change of circum- " stances. . . ." The tenant, in referring the tenancy to the tribunal, alleged no change of circumstances. It is clear, therefore, that unless there was a change of circumstances, on which the tenant could rely, the case was entirely covered by *Rex* v. *Fulham, Hammersmith and Kensington Rent Tribunal; Ex parte Gormly*,[1] in which this court granted certiorari and quashed the decision of a tribunal interfering with a rent which they had previously determined. The court pointed out in that case that the rent, having once been determined, could be altered only under the provisions of section 2 (3) of the Act of 1946 on the ground of a change of circumstances.

In answering the tenant's claim the landlord stated that the rates and other outgoings had increased. Thereupon, the tribunal seem to have regarded the increase in outgoings, which was the only change of circumstances alleged, as a change of circumstance enabling them to proceed on the tenant's application to reduce the rent. It is impossible to construe the Act of Parliament in this way. Counsel for the tribunal has strenuously argued that once any change of circumstance is shown, the matter is at large for the tribunal to deal with. If such a construction were placed upon this subsection, I think that it would be nothing more nor less than a trap, because a landlord applying to a tribunal to reconsider a rent already determined on the ground that there had been an increase in the rates might suddenly be met with the whole case being reopened and the tribunal reducing the rent although the rates had increased. That seems to me to be a most astonishing proposition.

The true construction to be placed upon section 2 (3) of the

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[1] [1952] 1 K.B. 179; [1951] 2 T.L.R. 1037; [1951] 2 All E.R. 1030.

Act of 1946 is that all that the tribunal can consider is the change of circumstances alleged. In considering the tenant's application in the present case, therefore, the only change of circumstances which had arisen since the rent had previously been determined was the increase in outgoings, and the jurisdiction of the tribunal was limited to that. The tribunal had no power and no jurisdiction to regard a case such as the present as one in which the whole matter was again at large and in which they could proceed to inquire whether a proper rent had been determined on the previous occasion. On that ground certiorari must go.

LYNSKEY J. I agree. The Furnished Houses (Rent Control) Act, 1946, s. 2 (3) reads: "Where the rent payable for any "premises has been entered in the register in accordance with "the provisions hereinafter contained "—that is to say, in accordance with section 3 (1)—" it shall be lawful for the lessor or "the lessee or the local authority to refer the case to the tribunal "for reconsideration of the rent so entered on the ground of "change of circumstances. . . ." The natural meaning of those words is that the tribunal is given power to reconsider the rent on the ground of the change of circumstances or, in other words, reconsider the rent in the light of such change of circumstances. That is the ordinary meaning of the sentence, but it is suggested by the respondents that the remaining words of the subsection, "and the provisions of subsection (2) of this section shall apply "on any such reference in like manner as they apply on a "reference under subsection (1) of this section subject to the "modification that the tribunal shall have power to increase the "rent payable," in some way either qualify or extend the jurisdiction to reconsider the rent on the ground of change of circumstances given to the tribunal by the first portion of the subsection. I do not so read that portion of the subsection, but regard it as providing the machinery whereby the tribunal shall reconsider the rent on the ground of change of circumstances. My view of this subsection is that the tribunal can only reconsider the rent if there is a change of circumstances, and must adjust the rent in the light of that change of circumstances. Speaking for myself, I would not limit their power to consider the change of circumstances to those changes of circumstances which are alleged by the person applying for reconsideration, whether lessor, lessee or local authority. The tribunal are entitled, once they have jurisdiction to deal with the matter, to consider any change of circumstances alleged, but it must be a change of circumstances and not a review of their decision upon circumstances which existed when they first determined the rent. The tribunal have gone far beyond their powers. No change of circumstances favourable to the applicant was alleged, and on the application before them the tribunal were not asked to exercise their powers under section 2 (3). I agree with my Lord that there should be certiorari in this case.

PARKER J. I agree with both judgments delivered, and would only add a word with regard to the construction of section 2 (3) of the Act of 1946. Counsel for the tribunal contended that under that subsection the tribunal have jurisdiction to consider the case if there has been any change of circumstances, whether it is one which redounds to the benefit of the landlord or of the tenant. He then went on to argue that the tribunal, once they have jurisdiction, are entitled to consider not only the change of circumstances, but the whole case de novo, and thereby, incidentally, acquire the right to review a decision which they feel was wrong. I entirely accept the first contention. In order that the tribunal should have jurisdiction, it matters not what the change of circumstances may be, whether on a tenant's application it be an increase in rates or, on a landlord's application, some other change which would be to the benefit of the tenant. Once there is a change, there is jurisdiction. The second contention, however, seems to be contrary to the natural reading of the subsection. It forces one to read the subsection as if the words "on the "ground of change of circumstances" qualify the referring of the case; in other words, that they mean only in the event of a change of circumstances. On the natural reading of the words the reconsideration which the tribunal are to make is one having regard to the change of circumstances and to that alone. It is suggested that the reference later in subsection (3) to the provisions of subsection (2) of section 2 shows that the tribunal are really reconsidering the whole case de novo. I certainly do not read it in that way; subsection (2) is only invoked as part of the machinery for determining the adjustment which is to be made having regard to the change of circumstances which has been proved.

For these reasons, I agree that this order should go.

Certiorari granted.
Decision of the tribunal quashed.

Solicitors: *S. Farren & Co.; The Solicitor for the Ministry of Health.*

THOMPSON *v.* WARD.

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Evershed M.R., Birkett and Romer L.JJ.

Landlord and Tenant—Rent restriction—Trespass—Licensee of statutory tenant—Premises left by tenant—Revocation of licence—Tenant's capacity to maintain action for trespass—Whether in "possession" — Vicarious possession — Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *s.* 15 (1).

A tenant of a dwelling-house within the protection of the Rent Acts installed his mistress in the premises. After some years had passed, the contractual tenancy was determined by the landlord, but the tenant continued in possession as a statutory tenant. Two years later, he took all his possessions and went away, leaving his mistress in occupation. She continued to live there for several years, paying rent to the landlord and all other outgoings. The tenant remarried and then, if not before, abandoned any intention of returning to the premises. Subsequently, however, he decided to return with his wife. He served a notice on the occupier, purporting to determine her licence, but she remained on in the premises. He then brought an action against her in the county court and obtained an order for possession. The occupier appealed:

Held, that on the facts as found, the tenant, having abandoned the premises with no intention of returning, had forfeited his status as a statutory tenant entitled to possession. The mere presence in the premises of his licensee was not sufficient to retain possession for him, since she was not installed and left in occupation with the intention of preserving the premises for the tenant's ultimate home-coming. Although, in view of *King's College, Cambridge* v. *Kershman* (1948) 64 T.L.R. 547, the tenant's obligations under the statutory tenancy towards the landlord might continue, for no notice to quit had been served by the tenant as required by section 15 (1) of the Increase of Rent and Mortgage Interest (Restrictions) Act of 1920, the tenant nevertheless had no right to possession of the premises and therefore had no interest which would be sufficient to maintain an action for trespass against the occupier.

Brown v. *Brash* [1948] 2 K.B. 247; 64 T.L.R. 266; [1948] 1 All E.R. 922, applied.

APPEAL from Judge Leon sitting at Willesden County Court.

In 1941, the plaintiff Thompson became tenant of premises known as No. 17 Buckingham Road, Harlesden, N.W.10, being premises within the Rent Acts. He lived in the premises with his wife until she died in 1944. Not long after her death the defendant, Mrs. Ward, came to live with Thompson and they continued in the premises, living together as man and wife. In 1947 the landlord served a notice of increase of rent, which operated to determine the contractual tenancy of Thompson, so that, thereafter, he remained in possession as a statutory tenant.

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About the same time Thompson took a lodger. Eventually that lodger supplanted Thompson in the affections of Mrs. Ward, and in 1949 Thompson left the premises and went to live with his daughter, taking with him all his possessions. The defendant, Mrs. Ward, continued to live in the premises with the lodger, paying rent to the landlord and all other outgoings, and it was found that the landlord did not know, until January, 1953, that the tenant Thompson was no longer living there. In 1950 Thompson remarried and went to live elsewhere with his wife, and on the facts as found, at that date, if not before, he abandoned any intention of returning to 17 Buckingham Road. Subsequently, however, he apparently changed his mind and decided to return to the premises with his wife. On November 11, 1952, he served a notice on Mrs. Ward purporting to determine her licence. As she refused to leave the premises, he brought proceedings against her in the county court, and on February 10, 1953, Judge Leon made an order for possession against her. She appealed against that order.

Thomas Whipham for Mrs. Ward, the defendant. The basis of the plaintiff's claim is trespass. He must, therefore, show that he is in possession or that he has the right to possession. But after the termination of his contractual tenancy his only right to possession was as a statutory tenant, and though *Keeves* v. *Dean* [1] established that a statutory tenant could maintain an action for trespass against an interloper, he cannot do so if his right to possession as a statutory tenant has gone. In the present case Thompson lost that right when he abandoned possession in 1950. Vis-à-vis the landlord he may have remained liable and may still be liable for the rent and other obligations of the statutory tenancy, for he has not given the notice required by section 15 (1) of the Act of 1920, but he no longer has any right or interest capable of supporting an action for trespass. Judge Leon cited *Boyer* v. *Warbey* [2] as authority for saying that because Thompson remained liable for the rent and so forth he was still the "tenant" and entitled to possession, but that case did not decide the status of a "non-occupying" tenant. Mrs. Ward paid rent in Thompson's name, and the landlord did not know that he was no longer living in the premises, but she ceased to be his licensee or to have any legal relations with him when he went away with no intention of returning.

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[1] [1924] 1 K.B. 685; 40 T.L.R. 211.

[2] [1953] 1 Q.B. 234; [1953] 1 All E.R. 269.

Thompson left the premises voluntarily and took all his possessions with him and Mrs. Ward, unlike the caretaker in *Brown* v. *Brash*,[3] was not left in possession with the intention of preserving the premises for his home-coming. She was paying the rent for her own sake, and Thompson, the ex-tenant, had nothing to do with it. She was not keeping the premises for him. Consequently, as from the date when he gave up possession, he had no right of re-entry. The position is exactly the same, as regards his rights against Mrs. Ward, as if he had attempted to assign his statutory tenancy to her.

[ROMER L.J. But if, as you say, he continued liable for rent, it would be odd if he had no right to possession of the property.]

"Rent" as used in relation to a statutory tenancy is not common law rent issuing out of the land; it is more a payment for use and occupation, and the statutory obligation to pay such a sum of money is not of itself sufficient to give the ex-tenant any right to possession, as against a squatter, for example, or as against the landlord, if the tenant has unequivocally abandoned possession, as in this case.

[ROMER L.J. It would seem, if you are right, that a statutory tenant who gives up possession unlawfully might be liable for repairs as well as for rent. But how could he discharge that obligation if he had no right to enter the premises?]

If a statutory tenant were liable for repairs under the terms of the statutory tenancy, he would be liable for any breach of that obligation, but his liability might sound only in damages. Even if, contrary to my submission, the tenant is entitled to an order for possession as against the licensee, he will not be entitled to possession as against the landlord, for, as Judge Leon found, he had abandoned possession, and the right to possession as against the landlord under the Rent Acts has, therefore, gone; a statutory tenancy cannot be revived by coming back into possession, nor can it arise except out of a contractual tenancy. But, of course, if the landlord accepts rent from the tenant knowing that he has abandoned possession but has returned, he would probably be a contractual tenant once more. [Counsel referred to *John M. Brown Ld.* v. *Bestwick*.[4]]

The status of a "non-occupying tenant" was considered in *Brown* v. *Brash*,[5] and it is submitted that Judge Leon's decision that the tenant is entitled to assert a right to possession of the premises notwithstanding that he abandoned possession is in conflict with the judgment of Asquith L.J. in *Brown* v. *Brash*[5] and a long line of cases. That case was not cited in *King's College, Cambridge* v. *Kershman*,[6] but it was cited in *Boyer* v. *Warbey*.[7] But neither of those cases, both of which were relied on by Judge Leon, deals with the matter in point here and which was dealt with by Asquith L.J. in *Brown* v. *Brash*.[8] Section 15 of the Act of 1920 does not deal with the status as regards third parties of the statutory tenant who unlawfully gives up possession; it merely safeguards the landlord's position.

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[3] [1948] 2 K.B. 247; 64 T.L.R. 266; [1948] 1 All E.R. 922.

[4] [1951] 1 K.B. 21; 66 T.L.R. (Pt. 2) 248; [1950] 2 All E.R. 338.

[5] [1948] 2 K.B. 247.

Stranger-Jones for the tenant, Thompson. A statutory tenant can bring an action in trespass even if he is temporarily out of occupation: see *Cruise* v. *Terrell*[9] and *Keeves* v. *Dean*.[10] Thompson has throughout the period of Mrs. Ward's occupation remained a statutory tenant within the meaning of section 15 (1) of the Act of 1920, and he has, therefore, all the time retained the right to possession of the premises. Once a statutory tenancy is in existence, the right of the statutory tenant to possession of the premises can be ended only by (i) an order of the court, or (ii) the giving up of possession by the tenant: see *Brown* v. *Draper*.[11] The tenant cannot give up possession unilaterally by abandoning the premises with the intention of never returning: see *Wiles* v. *Morse*, Estates Gazette, April 8, 1950, p. 290, where the conflict between *Brown* v. *Brash*[12] and *King's College, Cambridge* v. *Kershman*[13] came up for consideration by the Court of Appeal.

[EVERSHED M.R. *King's College, Cambridge* v. *Kershman*[13] and *Boyer* v. *Warbey*[14] were decided on a narrower point than *Brown* v. *Brash*[15]; a statutory tenant cannot get rid of his obligations by abandoning possession of the premises and in that sense he cannot determine the tenancy, but there is nothing in those cases which conflicts with what Asquith L.J. said in *Brown* v. *Brash*[15] as to the loss of the right to possession if a tenant abandons the premises.]

Although a statutory tenant who gives up possession would be unable to resist an application by the landlord, he, nevertheless, retains the right to possession until an order for possession is actually made against him, for, until the landlord comes to the court, it is not certain whether he will wish to hold the tenant to his tenancy or whether he will seek to take possession. Until an order is made, the tenant's right, though vulnerable as regards the landlord, is good against a licensee or a trespasser in the premises.

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[5] [1948] 2 K.B. 247.

[6] (1948) 64 T.L.R. 547.

[7] [1953] 1 Q.B. 234.

[8] [1948] 2 K.B. 247.

[9] [1922] 1 K.B. 664; 38 T.L.R. 379.

[10] [1924] 1 K.B. 685; 40 T.L.R. 211.

[11] [1944] K.B. 309; 60 T.L.R. 219; [1944] 1 All E.R. 246.

[12] [1948] 2 K.B. 247.

[13] 64 T.L.R. 547.

[14] [1953] 1 Q.B. 234.

[15] [1948] 2 K.B. 247.

The tenant cannot, unilaterally, by abandoning possession in his own mind, determine the statutory tenancy, for, under section 15 (1), he retains all the obligations of the tenancy until he serves the requisite notice. "Obligation" includes an obligation to retain possession. Here Mrs. Ward is under an obligation to retain possession for Thompson. This case is, therefore, distinguishable from the case of a squatter coming in when the tenant is absent.

[ROMER L.J. But Asquith L.J. in *Brown* v. *Brash* [15] referred to the installation of a caretaker with the function of preserving the premises for the home-coming of the tenant. If your submission is correct the installation of a mere licensee would in itself be sufficient.]

Any overt act such as the installation of a licensee or caretaker is sufficient. In *Brown* v. *Brash* [15] the status of the caretaker could not have been in point for she had gone away; the premises were empty. That case is distinguishable from this; it was concerned with the relation of the landlord and the tenant; not, as here, with questions of third parties.

[EVERSHED M.R. But the tenant has now determined the licence of Mrs. Ward, so he cannot now have a right to possession through her. Further, *Skinner* v. *Geary* [16] shows that the principle of the Rent Acts is to protect residing tenants, which means that they must be in personal occupation. This tenant was not in possession through Mrs. Ward's presence, for it is quite clear that she was and is not there for him, no matter how she went into the premises. And if the tenant's sole right to possession is through the presence of his licensee, it would go immediately he obtained an order for possession against his licensee, so that the landlord could then turn him out.]

But if the tenant gets back into physical occupation before the landlord takes any steps, he could resist the claim, for his statutory tenancy would have continued all the time. Here it is not clear whether the landlord will take any action.

[EVERSHED M.R. He is dead. If a statutory tenant could

[15] [1948] 2 K.B. 247.

[16] [1931] 2 K.B. 546; 47 T.L.R. 597.

retain possession by the mere installation of a licensee there would be a substantial loophole in the Rent Acts, for if the tenant acted skilfully the landlord would know nothing and the tenant, when challenged, could say that he had only left temporarily and intended to come back.]

It is inequitable to require the ex-tenant to observe the obligations of the tenancy unless he also retains his rights under the tenancy. It is submitted that both obligations and benefits of the tenancy continue until the landlord gets an order for possession.

[EVERSHED M.R. But in order to sustain an action for trespass the tenant must show that he is entitled to possession and he cannot do that if the landlord could at any time obtain an order against him.]

The rights of the tenant are only voidable at the instance of the landlord; they are not void.

Finally, it is submitted that a licensee cannot deny the title of the licensor who let him or her into possession.

[EVERSHED M.R. But here there was no grant of a licence for valuable consideration; Mrs. Ward, quoad Thompson, is merely a squatter for he has determined her licence.]

Whipham in reply. *Wiles* v. *Morse* (supra) is not in point. As to the statement that the tenant cannot give up possession by mere intention, Judge Leon found that Thompson had abandoned possession and had no intention of returning. Section 15 (1) provides that a tenant cannot give up possession lawfully without giving the proper notice, but he may, nevertheless, cease to be in possession, as, for example, where a statutory tenant attempts to assign his personal right as statutory tenant.

[BIRKETT L.J. Section 15 (1) is a procedural section, giving a way of determining the statutory tenancy; it has nothing to do with the status of a statutory tenant.]

EVERSHED M.R. This is in substance an action for trespass to land and it has been argued before us on that basis. I start with that statement because it is, in my judgment, fundamental to the whole problem, which is one of nicety and difficulty arising under the rent restriction legislation. [His Lordship stated the facts and continued:] The question is whether the effect of section 15 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, is that there still persists in the plaintiff such a right in respect of these premises as will support an action for trespass. It is necessary to bear in mind that before the rent restriction legislation an action for trespass was only maintainable at the suit of him who was in possession of the land, using the word "possession" in its strict sense and including a person entitled to immediate and exclusive possession. There is, however, no doubt that whatever may be the exact nature of the personal rights of occupation given by the rent restriction legislation, those rights are good against all the world, as Scrutton L.J. observed as long ago as 1923 in *Keeves* v. *Dean.*[1] Scrutton L.J. said[2]: "I take it that he"—that is, the statutory tenant—"could maintain trespass against any person "who entered the premises without his permission."

A good deal of water has flowed under Westminster Bridge since 1923 so far as this legislation is concerned. In 1948 there came before this court *Brown* v. *Brash*,[3] in which the tenant, or former tenant, had been convicted of a felony and sentenced to a term of imprisonment. When he went to prison he left in the house which he had occupied his mistress and two children which he had had by her. During the term of his incarceration those persons left the premises so that the house fell vacant. The landlord thereupon retook possession. The former tenant, on being released from prison, sought to recover possession by action, claiming that as his absence from the house was attributable to his involuntary misfortune his statutory tenancy must be treated as still subsisting.

I have referred to the facts of that case because counsel for the plaintiff is entitled to point out that the language of Asquith L.J., which I am about to read, was appropriate to, and was delivered with reference to, the particular facts of the particular case then before the court. Asquith L.J. delivered the reserved judgment of the court, and, picking up, so to say, the principles expounded by Scrutton L.J. in *Keeves* v. *Dean*,[4] and later in *Skinner* v. *Geary*,[5] he analysed the precise situation of the person commonly called a "statutory tenant." He said[6]: "We are "of opinion that a 'non-occupying' tenant prima facie forfeits "his status as a statutory tenant. But what is meant by 'non-"'occupying'? The term clearly cannot cover every tenant "who, for however short a time, or however necessary a purpose, "or with whatever intention as regards returning, absents himself "from the demised premises. To retain possession or occupation

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[1] [1924] 1 K.B. 685; 40 T.L.R. 211.

[2] [1924] 1 K.B. 694.

[3] [1948] 2 K.B. 247; 64 T.L.R. 266; [1948] 1 All E.R. 922.

[4] [1924] 1 K.B. 685, 694.

[5] [1931] 2 K.B. 546; 47 T.L.R. 597.

[6] [1948] 2 K.B. 247, 254.

"for the purpose of retaining protection the tenant cannot be "compelled to spend 24 hours in all weathers under his own roof "for 365 days in the year. Clearly, for instance, the tenant of a "London house who spends his week-ends in the country or his "long vacation in Scotland does not necessarily cease to be in "occupation. Nevertheless, absence may be sufficiently prolonged or unintermittent to compel the inference, prima facie, "of a cesser of possession or occupation. The question is one of "fact and of degree. Assume an absence sufficiently prolonged "to have this effect: The legal result seems to us to be as follows: "(1) The onus is then on the tenant to repel the presumption "that his possession has ceased. (2) In order to repel it he must "at all events establish a de facto intention on his part to return "after his absence. (3) But we are of opinion that neither in "principle nor on the authorities can this be enough. To suppose "that he can absent himself for five or ten years or more and "retain possession and his protected status simply by proving an "inward intention to return after so protracted an absence would "be to frustrate the spirit and policy of the Acts, as affirmed in "*Keeves* v. *Dean*[7] and *Skinner* v. *Geary*.[8] (4) Notwithstanding "an absence so protracted the authorities suggest that its effect "may be averted if he couples and clothes his inward intention "with some formal, outward, and visible sign of it; that is, instals "in the premises some caretaker or representative, be it a "relative or not, with the status of a licensee and with the "function of preserving the premises for his own ultimate homecoming. There will then, at all events, be someone to profit "by the housing accommodation involved, which will not stand "empty. It may be that the same result can be secured by "leaving on the premises, as a deliberate symbol of continued "occupation, furniture"—and then he referred to *Brown* v. *Draper*.[9] "Apart from authority, in principle, possession in "fact (for it is with possession in fact and not with possession "in law that we are here concerned) requires not merely an "'animus possidendi' but a 'corpus possessionis' namely, some "visible state of affairs in which the animus possidendi finds "expression. (5) If the caretaker (to use that term for short) "leaves or the furniture is removed from the premises otherwise "than quite temporarily, we are of opinion that the protection, "artificially prolonged by their presence, ceases, whether the "tenant wills or desires such removal or not."

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[7] [1924] 1 K.B. 685.

[8] [1931] 2 K.B. 546.

[9] [1944] K.B. 309; 60 T.L.R. 219; [1944] 1 All E.R. 246.

The question is whether the plaintiff falls within the ambit of what Asquith L.J. called a "non-occupying tenant." For if he does, it seems to me that, whatever might be the position as between him and his landlord under section 15, or otherwise in proceedings between him and his landlord, he cannot have such a right to possession of these premises as will support an action of trespass at law. In this case, I think, on the facts as found by the judge, the plaintiff is a "non-occupying tenant" within the meaning of that phrase. At least, he has failed to establish that he has such a right of possession as will suffice to maintain his action. In addition to the other facts, there is the important finding: "The plaintiff was not sure when he left whether he "intended to return, but subsequently he remarried and on his "remarriage, if not before, he ceased to have any intention of "returning to the premises." If the matter rested there, I should not have felt difficulty, but undoubtedly there is difficulty. Mr. Stranger-Jones says that, having regard to section 15, this statutory tenant remains a statutory tenant whether he wishes or not because, whatever intention may have been locked in the recesses of his mind, he failed to take the only step open to him to put an end to the statutory tenancy. Further, he says that the defendant's presence in this house points to the fact that she was given a licence by the plaintiff; and that if those two circumstances are combined, there is no answer to the claim at the plaintiff's suit against the defendant for possession of the premises after the termination of the licence.

Section 15 (1) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, provides: "A tenant who by virtue of "the provisions of this Act retains possession of any dwelling-"house to which this Act applies shall, so long as he retains "possession, observe and be entitled to the benefit of all the "terms and conditions of the original contract of tenancy, so "far as the same are consistent with the provisions of this Act, "and shall be entitled to give up possession of the dwelling-"house only on giving such notice as would have been required "under the original contract of tenancy." It is not in dispute, so far as the last few lines are concerned, that no such notice has been given. Nor is it in dispute that if in any proceedings by the landlord under this section the tenant sought to say, "I "have given up possession," he would be liable to be met with the answer, "No, you have failed to give the notice whereby alone "you are entitled to give up possession." I deem it unnecessary, and indeed, unwise, in these proceedings to involve myself

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in any attempted exposition of matters which are not only difficult but which, I think, are not material to the present decision. If the tenant "retains possession" within the meaning of the section then, and then only, he is entitled to be called a statutory tenant, and then, and then only, according to the section, he is bound by, and enjoys, the benefit of the terms and conditions of the original contract of tenancy so far as they are applicable. But the question is, does he now retain possession?

If the plaintiff seeks to rely on section 15, he must at least show that he retains possession. I have already given reasons for thinking that in this action he has not succeeded in establishing that he does retain "possession," that is, possession of a nature and character sufficient to support his action. To decide the contrary would conflict with the Court of Appeal's decision in *Brown* v. *Brash*,[10] or, at best, to create undesirable refinements to the propositions which Asquith L.J. there enunciated. It may be that a tenant who has lost his right to say that he is a statutory tenant having the protection of the Act, none the less remains liable to the landlord for rent, or the equivalent of rent, and perhaps for other obligations which he may have failed to perform. I think that that was decided in the case on which Mr. Stranger-Jones particularly relied, *King's College, Cambridge* v. *Kershman*.[11] In that case a tenant brought his wife and her parents to the premises, but subsequently he quarrelled with them and he left the premises. The landlord, in due course, brought proceedings for possession. The only matter with which the Court of Appeal was concerned in that case was whether the "tenant," who had been held to have failed to give proper notice under section 15, still remained liable for rent or mesne profits although the landlord, who was the plaintiff in the action, had recovered possession. This court held that he remained liable.

That case was decided in October, 1948, some five months after *Brown* v. *Brash* [12] and it does not appear that *Brown* v. *Brash* [12] was cited. But I do not think that the principles of *Brown* v. *Brash* [12] were relevant. The ratio decidendi in *King's College, Cambridge* v. *Kershman* [13] appears clearly from the judgment of Tucker L.J.[14]: "Mr. Levine's argument on the "main part of the case, as I understood it, amounts to this: "that, because a person who has been a statutory tenant may

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[10] [1948] 2 K.B. 247.

[11] 64 T.L.R. 547.

[12] [1948] 2 K.B. 247.

[13] 64 T.L.R. 547.

[14] Ibid. 548.

"deprive himself of the protection of the Act by going out of "physical occupation of the premises,"—an observation which is entirely consistent with *Brown* v. *Brash* [15]—"it follows that "if and when he so does he is relieved from the obligation of "giving notice to quit under section 15 (1) of the Increase of "Rent and Mortgage Interest (Restrictions) Act, 1920. For the "reasons stated by my Lord, I do not think that that is a sound "proposition." It will be seen, therefore, that *King's College, Cambridge* v. *Kershman* [16] was decided on a much narrower point than that discussed in *Brown* v. *Brash*.[17]

It was, however, said by Mr. Stranger-Jones that the conflict which (according to him) underlay those two cases came up for consideration before this court in 1950 in *Wiles* v. *Morse*. The case is briefly reported and only in the Estates Gazette of April 8, 1950, p. 290. The defendant, Morse, had apparently been the tenant. He quarrelled with his wife and left the premises, but she remained there. Eventually husband and wife were divorced; Mrs. Morse remarried, and she continued in the premises with her new husband, Mr. Farnol. So far as I can discern from the note of the judgment of Somervell L.J., the point which this court decided was that the mere fact that Mrs. Morse, as a result of the decree absolute, ceased to be Mr. Morse's wife, did not automatically, and of itself, put an end to her occupation on behalf of Mr. Morse, and the decision was limited to that. I add also that, according to the report (though it is said that this sentence is not in accordance with the argument), Somervell L.J. said: "Mr. Morse was still saying, 'I am your "'statutory tenant,' and, in these circumstances, the fact that "the plaintiffs called and accepted rent due under a statutory "tenancy from Mrs. Morse did not seem any evidence . . . which "would establish a new relation of landlord and tenant." I do not think, therefore, that anything in the report runs counter to what I have said.

I come back, then, to the point with which I began; has the plaintiff in this action established such a right to or interest in the land as will support an action for trespass? I think that he has failed because, on principle, and particularly having regard to the careful language of Asquith L.J. in giving the judgment of the court in *Brown* v. *Brash*,[17] he is not "in possession" in the sense relevant to an action for trespass, nor is he capable of maintaining such an action. Judge Leon came to the contrary

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[15] [1948] 2 K.B. 247.

[16] 64 T.L.R. 547.

[17] [1948] 2 K.B. 247.

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conclusion, basing himself, according to his judgment, on *Boyer* v. *Warbey*,[18] another case in this court. But that case, I think, goes no further than *King's College, Cambridge* v. *Kershman.*[19] The tenant, Warbey, who had become a statutory tenant, abandoned the premises, in the sense that he left them and had no intention to return. The landlords were unwilling to accept that departure as a determination of the tenant's obligation for rent and otherwise. In due course, the landlords re-let, and the re-letting, of course, put an end to any existing obligation on the tenant, Warbey. The landlords sued for rent during the period between the date when the tenant removed himself from the house and the new letting. It was argued by Mr. Platts-Mills, who appeared for the defendant tenant, that the plaintiffs' claim should have been for damages for failure by the tenant to perform his proper statutory obligation to give notice under section 15 (1). Prima facie, there is no difference in substance between the two claims, for the damages would be measured by the rent. But Mr. Platts-Mills sought to show that the plaintiffs had failed to mitigate the damages. On a number of grounds, including the ground that the argument had never been taken in the court below, this court rejected the defendant's appeal on this point. True, Denning L.J. expressed the view, following *King's College, Cambridge* v. *Kershman*,[19] that, until an effective notice had been served or the statutory tenancy was otherwise determined by surrender or by operation of law, the obligation to pay rent continued. Whether the correct form of claim in such cases is for rent or for damages for breach of the statutory obligation may some day have to be further considered; but for the purposes of this case, it does not, I think, matter. We are not concerned with what may be the rights and duties persisting between the landlord and the plaintiff. We are concerned to decide only whether the plaintiff has established a sufficient foundation for his action of trespass.

One final matter I must mention; it is said by Mr. Stranger-Jones that, since Mrs. Ward's presence on the premises must be attributed to a licence given by the plaintiff, it, therefore, follows that the plaintiff is still in possession, so to speak, in the person of his licensee. Again, I think that for the purposes of these Acts such a conclusion would be in conflict with the reasoning of Asquith L.J. In the passage which I have already quoted [20] he makes clear, in my judgment, that in order that a statutory tenant may be said to retain possession through the medium of an occupying licensee, the latter must be his licensee "with the "function of preserving the premises for [the tenant's] own "ultimate homecoming." A person in Mrs. Ward's position, according to the facts of this case, seems to me not to qualify as such a licensee. The position, therefore, of the plaintiff seems to me to be that which I have stated, namely, one who has failed to establish a sufficient right or interest in the property to maintain an action for trespass. In the result, and without going into the many matters which have been put before us, I think, with all respect to Judge Leon, that he should not have made an order for possession, but should have dismissed the action. In my judgment, therefore, this appeal should be allowed.

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[18] [1953] 1 Q.B. 234; [1953] 1 All E.R. 269.

[19] 64 T.L.R. 547.

[20] [1948] 2 K.B. 247, 254.

BIRKETT L.J. I agree with the judgment which has been delivered. There is only one simple matter to be determined in this appeal. Counsel for the plaintiff asserted that he was, at the time of the hearing in the county court, and is today, a statutory tenant, and that that position gave him the authority and the necessary power to bring this action against Mrs. Ward for possession.

[His Lordship referred to the facts and continued:] The finding by Judge Leon was: "The plaintiff left the premises in "1949 and did not leave any of his property there. The furniture "in the part of the premises occupied by Mrs. Ward belonged "to her. The plaintiff was not sure when he left whether he "intended to return, but, subsequently, he remarried, and on "his remarriage, if not before, he ceased to have any intention "of returning to the premises." Of course, on the face of that finding it would be difficult to maintain that he was still the statutory tenant. Indeed, I agree that it would be impossible to support the argument for the plaintiff without conflicting with the very careful decision in *Brown* v. *Brash.*[21] That judgment, if I may say so with the greatest respect, bears evidence of the extreme care with which it had been prepared. The argument of counsel, the various cases cited and the long parts of the judgment before the passage quoted by my Lord, make it obvious that the judgment was intended to make the law as clear as it could be made on a very difficult part of the Rent Acts. The facts in that case, of course, differ from those in the present case, and counsel for the plaintiff sought to distinguish it on that ground.

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[21] [1948] 2 K.B. 247.

But I do not think that it can be distinguished. The material words are: "We are of opinion that a 'non-occupying' tenant "prima facie forfeits his status as a statutory tenant." [22] It is clear on the findings of fact and on the evidence that when the action was heard by Judge Leon the plaintiff was really a non-occupying tenant.

It is said that, by virtue of subsection (1) of section 15 of the Act of 1920, *Brown* v. *Brash* [23] does not affect or apply to this case, and that it can be distinguished because section 15 (1) provides that "A tenant who by virtue of the provisions of this "Act retains possession of any dwelling-house to which this Act "applies shall, so long as he retains possession, observe and be "entitled to the benefit of all the terms and conditions of the "original contract of tenancy, so far as the same are consistent "with the provisions of this Act, and shall be entitled to give up "possession of the dwelling-house only on giving such notice as "would have been required under the original contract." It is said that no such notice was given in this case and that, therefore, it is impossible for the plaintiff to rid himself of his character as a statutory tenant. I do not propose to enter into any question as to the relationship between the plaintiff and his landlord. I agree that interesting, delicate and difficult questions might arise, but I think that the only question to be determined here is whether the plaintiff was entitled to sue Mrs. Ward because of her presence in the house. I do not think that he was, and I think that that is sufficient to determine this case.

I, therefore, express my agreement with the judgment of my Lord that this appeal ought to be allowed.

ROMER L.J. I also agree and have very little to add. It was part of Mr. Stranger-Jones' argument for the plaintiff, as I understood it, that the mere installation by a statutory tenant of a licensee in the premises is sufficient to preserve the tenant's right of protection under the Act. I think that it is not possible to accept that submission without running counter to the decision of this court in *Brown* v. *Brash*.[23] Asquith L.J., in delivering the judgment of the court, laid down five propositions, and the fourth one was [24]: "Notwithstanding an absence so protracted" (that is, an absence by the tenant) "the authorities suggest that "its effect may be averted if he couples and clothes his inward "intention with some formal, outward, and visible sign of it, that

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[22] [1948] 2 K.B. 247, 254.

[23] [1948] 2 K.B. 247.

[24] Ibid. 254.

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"is," and I gather those words should read "for example," "instals in the premises some caretaker or representative, be it "a relative or not, with the status of a licensee and with the "function of preserving the premises for his own ultimate "home-coming." It seems to me that if the submission of Mr. Stranger-Jones be right, it would only have been necessary to say in that proposition, "for example, instals in the premises ". . . a licensee." The rest of the words which Asquith L.J. used as a qualification (and as, in my opinion, an essential part) of that proposition, could have been omitted; but their presence suggests forcibly and, indeed, irresistibly to my mind, that it was not merely the installation of a licensee that was regarded as being of importance, but that there must be a licensee with a particular function, namely, the function of preserving the premises for the tenant's home-coming. Unless this can be postulated of a caretaker, and he has that function to discharge, his presence in the house is of no avail to the statutory tenant. Accordingly, I cannot accept the submission of Mr. Stranger-Jones to the contrary.

The only other point which I should like to mention is what, at first sight, might appear to be something of an anomaly. It has been held by this court in *Boyer* v. *Warbey* [25] that if a statutory tenant goes out of possession and abandons possession without giving the requisite notice to his landlord, he continues liable to pay rent, or to make payments in the nature of rent. The result of our view is that that obligation is not accompanied by any corresponding right or interest sufficient to entitle the tenant to bring an action for trespass in relation to the premises. The result may be unexpected, but I think that it arises out of the very special and artificial position of a statutory tenant and the application to such a tenant of the language of section 15 (1) of the Act of 1920.

I agree that the appeal should be allowed.

Appeal allowed.
Costs as between party and party.
Appellant's costs to be taxed as between solicitor and client under the Legal Aid Act.
Leave to appeal refused.

Solicitors: *Montagu's & Cox & Cardale; Edgar H. Hiscocks.*

E. D.

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[25] [1953] 1 Q.B. 234.

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Lord Goddard C.J., Lynskey and Parker JJ.

LESTER *v.* BALFOUR WILLIAMSON MERCHANT SHIPPERS LD.

Weights and Measures—Principal and agent—Contract—Sale of imported tinned food—Underweight tins sold by retail—Whether sale "due to act or default" of import brokers—Brokers not "sellers"—"For account of our principals"—Pre-packed Food (Weights and Measures: Marking) Order, 1950 (*S.I.* 1950, *No.* 1125), *art.* 6 (1) (3).

By the Pre-Packed Food (Weights and Measures: Marking) Order, 1950, art. 6 (3): "Where . . . an offence has been committed "in respect of which proceedings might be instituted for an "infringement of this Order against some person and . . . that "offence was due to an act or default of some other person . . ." proceedings may "be instituted against that other person. . . ."

By a contract brokers sold to wholesalers "for account of our "principals" (who were disclosed as a foreign company), c.i.f. London, a quantity of tins of beans in respect of which they obtained an import licence. The contract was signed by the brokers, there being no qualification to the signature. When the goods were sold by retailers it was found that a number of the tins contained less than the net minimum weight shown on their labels. Informations were preferred under the Pre-Packed Food (Weights and Measures: Marking) Order, 1950, against the brokers alleging that by virtue of article 6 (3) they sold by retail tins of pre-packed food the labels on which did not bear a true statement of the minimum net weight of the contents. The justices were satisfied that the brokers never had physical possession, or the opportunity of taking physical possession, of the goods, and considering that, in consequence, it could not be said that the brokers had committed any act or default causing the deficiencies alleged, dismissed the informations. On appeal by the prosecutor:—

Held, that if the brokers had been the sellers of the goods they would have been liable under the Order whether or not they had been guilty of negligence and even though they had had no opportunity of weighing or handling the goods; but that they were not the sellers, for on the construction of the contract they sold as brokers, neither acquiring rights nor incurring liabilities as between buyer and seller, and there was no contractual nexus between them and the wholesalers; that, accordingly, there could not have been any act or default on their part which caused the retailers to be in possession of the deficient tins; and that the brokers were not, therefore, liable under the Order, and the decision of the justices, though not their reasoning, was right.

On the authority of *Gadd* v. *Houghton* (1876) 1 Ex.D. 357, approved in *Universal Steam Navigation Co. Ld.* v. *James McKelvie & Co.* [1923] A.C. 492; 39 T.L.R. 480, it was immaterial that the signature of the brokers to the contract was unqualified, because it was clear from the contract itself, in particular from the words "for account of our principals," that they were selling as brokers on behalf of a principal and were not themselves the sellers.

CASE STATED by Hastings justices.

Informations were preferred by the appellant, Hastings Town Clerk, under the Pre-Packed Food (Weights and Measures: Marking) Order, 1950,[1] against the respondents alleging that they on October 13, 1952, by virtue of article 6 (3) of the Order, at seven different places in the borough of Hastings, did sell by retail pre-packed food, namely, a varying number of tins of Sinovich Brand Beans with Vienna Sausages in Tomato Sauce, the labels on which did not bear a true statement of the minimum net weight of the contents.

The following facts were proved or admitted before the justices:—On October 13, 1952, the Inspector of Weights and Measures for the borough of Hastings visited a grocer's shop in the borough where he saw 50 tins of Sinovich Brand Beans with Vienna Sausages in Tomato Sauce exposed for sale. He purchased six tins and weighed the remainder, and found that 37 out of the 50 tins contained less than the stated weight of 1 lb. 4 oz. The inspector visited the respective premises of six other grocers in the borough, and from each he purchased one tin of Sinovich Brand Beans with Vienna Sausages in Tomato Sauce and at each he weighed the remainder of tins displayed for sale; 159 tins out of 215 tins that were weighed were found to contain less than the quantity stated. The tins weighed by the inspector were part of a consignment sold by the respondents, Balfour Williamson Merchant Shippers Ld., to Charles Arkcoll Ld., the wholesalers concerned, under a contract between the respondents and Charles Arkcoll Ld. dated October 31, 1951, by which the respondents for account of their principals sold to Charles Arkcoll Ld. 500 cartons of Sinovich Brand Beans with Vienna Sausages in Tomato Sauce. The principals referred to in the contract were the Sinovich Canning Company (Pty.) Ld., who carried on business in South Africa and in consequence were outside the justices' jurisdiction. The tins did not leave South Africa until April 24, 1952, or later, and neither the right to physical possession of the tins nor even the right to take physical possession of the tins was reserved to the respondents under the terms of the contract of sale. The tins were cleared through the Customs and sold to retailers by Charles Arkcoll Ld.

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[1] Pre-Packed Food (Weights and Measures: Marking) Order, 1950, art. 1: "(1) . . . no person shall sell "by retail or have in his possession "for sale by retail any pre-packed "food unless the wrapper or container "in which it is packed or a label "securely attached thereto is . . . "marked . . . with a true statement "of the minimum quantity of the "food contained therein. . . ."

On behalf of the appellant it was contended that the act which the respondents had committed was the act of selling, and that the fact that they had not had physical possession or the right to physical possession of the tins did not enable them to escape criminal liability for goods which did not comply with the requirements of the Pre-Packed Food (Weights and Measures: Marking) Order, 1950.

It was contended for the respondents that the mere act of selling was not sufficient to come within the words "act or "default" in article 6 (3), and that no other act or default had been or could be committed by them as they had never had physical possession or the right to physical possession of the goods.

The justices were of opinion that it must be proved to the satisfaction of the court that the deficiencies alleged were committed either by the act or default of the respondents, and on the evidence for the prosecution they were satisfied that the respondents never had physical possession of the goods or the opportunity of taking physical possession and in consequence that it could not be said that they had committed any act or default that would have justified calling upon the respondents. They accordingly dismissed the summonses.

The prosecutor appealed.

The contract between the respondents and Charles Arkcoll Ld. was in the following terms: "We have this day sold to you for "account of our principals . . . 500 . . . cartons . . . tins "labelled 'Sinovich' Brand, South African Beans with Vienna "Sausages in Tomato Sauce, at 17s. . . . per dozen tins, c.i.f. "London. Sinovich Canning Co. (Pty.) Ltd. 1951 pack. Subject "to export licence. . . . Insurance marine (W. P. A.) and war "risk insurance to be covered by sellers for the c.i.f. contract "price. . . . War Risk premium at current rate for seller's "account, any increase for account of buyers. . . . Labels: "To conform to the Labelling of Food Order, 1950. Payment: "net cash against documents on first presentation in London. "Import licence: this contract is subject to import licence being "granted to Balfour, Williamson Merchant Shippers Ltd." The contract was signed by the respondents by a director.

Paul Wrightson for the appellant. The Order is similar to the Food and Drugs Act, 1938, in that the mere act of sale is sufficient to constitute the offence, but the retailers who sold the deficient tins could, under article 4 (1) (*c*),[2] bring in, as a defence, Charles Arkcoll Ld., who, in turn, would have had a defence by bringing in the respondents. The prosecution, by article 6 (3), were, therefore, entitled to go against the respondents in the first place. The respondents' principals, being outside the jurisdiction, cannot be brought in, and therefore it is submitted that the respondents are liable in respect of the sale of deficient tins by the retailers. [Reference was made to *Lindley* v. *G. W. Horner & Co. Ld.*[3] and *Lamb* v. *Sunderland and District Creamery Ld.*[4]]

[LORD GODDARD C.J. The respondents were only acting as brokers for a disclosed foreign principal; they had no opportunity to examine or handle the goods.]

The respondents imported the goods under licence and passed them on; that was an " act or default " within the meaning of article 6 (3). They made the contract which was the cause of the retailers being in possession of the goods; causing goods to be supplied is also an act or default within the meaning of article 6 (3).

Crichton Q.C. and *Edward Gardner* for the respondents. If the respondents were the sellers the prosecutor must nevertheless establish affirmatively that the sale of the tins by the retailers was due to an act or default on the respondents' part. The respondents were in the position of commercial travellers acting for a number of principals. The making of the contract by them was not in any way the cause of the sale of the deficient tins. The Order contemplates a tracing back of the absence of diligence to the last person whose omission to perform a duty resulted in the sale of underweight goods. The contract was not one for the sale of a commodity in the physical possession of the respondents, but was for the sale of goods not yet in the country. *Lamb* v. *Sunderland and District Creamery Ld.*[5] should be distinguished.

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[2] Pre-Packed Food (Weights and Measures: Marking) Order, 1950 (as amended by Pre-Packed Food (Weights and Measures: Marking) (Amendment) Order, 1951 (S.I. 1951, No. 996)), art. 4 (1): " In any proceed-" ings for an infringement of article 1 " or 2 of this Order . . . it shall be a " defence for the person charged to " prove:— . . . (*c*) that . . . all the " following conditions are fulfilled . . . " (i) that he purchased that food in " the United Kingdom from another " person carrying on there the business " of supplying food of that description " and that it was then packed in the " . . . container in which it was at " the time of the infringement . . . " and (ii) that the statement of . . . " aggregate weight in respect of which " the infringement is alleged was " marked on the wrapper, container or " label . . . when he received it from " that other person; and (iii) that at " the time of the infringement he had " no reason to believe that this Order " was being infringed. . . ."

Art. 6: " (3) Where it appears to " the Board of Trade or any other " authority . . . that an offence has " been committed in respect of which " proceedings might be instituted for " an infringement of this Order " against some person and the Board " or that other authority are reason-" ably satisfied that that offence was " due to an act or default of some " other person and that the first-" mentioned person could establish a " defence under paragraph (1) of this " article they may cause proceedings " to be instituted against that other " person without first causing pro-" ceedings to be instituted against the " first-mentioned person."

[3] (1950) 66 T.L.R. (Pt. 1) 296; [1950] 1 All E.R. 234.

[4] [1951] 1 All E.R. 923.

[The court intimated that if the respondents had sold the tins to Charles Arkcoll Ld. they would be liable under the Order, and the case was adjourned for argument on the question whether or not the respondents were the sellers.]

April 24. *Crichton.* It is clear that the respondents were brokers only; the contract puts no responsibility on them, except as agents of the sellers. It is not necessary for the signature on the contract to be qualified; the wording of the contract as a whole is sufficient to show that they signed as agents: see *Gadd* v. *Houghton*,[6] where it was held that the fact that the contract disclosed a named principal was sufficient to remove the broker from it. That was a principle developed in *Fleet* v. *Murton*,[7] where the principal was disclosed but unnamed. In a number of cases the agent's liability depended upon a trade custom: *Pike* v. *Ongley*[8] and *Miller, Gibb & Co.* v. *Smith & Tyrer Ld.*,[9] where there was a foreign principal. It is submitted that this case is covered by *Gadd* v. *Houghton*,[10] which was affirmed in *Universal Steam Navigation Co. Ld.* v. *James McKelvie & Co.*[11] [*Holding* v. *Elliott*[12] was also referred to.]

Paul Wrightson in reply. The contract was one of purchase; all the circumstances of the case must be looked at to decide whether the respondents sold as agents or not. Even if the respondents were agents, Charles Arkcoll Ld. would still have had a defence under article 4 (1) (*c*) of the Order. The act of the agent is the act of his principal, and Charles Arkcoll Ld. could show that they had purchased the goods in the United Kingdom from another person carrying on the business of supplying food, i.e., from the respondents' principals.

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[5] [1951] 1 All E.R. 923.

[6] (1876) 1 Ex.D. 357.

[7] (1871) L.R. 7 Q.B. 126.

[8] (1887) 18 Q.B.D. 708; 3 T.L.R. 549.

[9] [1917] 2 K.B. 141; 33 T.L.R. 295.

[10] 1 Ex.D. 357.

[11] [1923] A.C. 492; 39 T.L.R. 480.

[12] (1860) 5 H. & N. 117.

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An agent cannot escape criminal liability merely by saying that he was an agent. The prima facie presumption that an agent is not liable normally arises from a signature as agent, but if the signature is unqualified that presumption is rebutted. If an agent acts on behalf of a foreign principal, by the law merchant the presumption is that he is liable even if he signed as agent. Although it was pointed out in *Miller, Gibb & Co.* v. *Smith & Tyrer Ld.*[13] that that rule had less force today, it was there held that the agent was liable. In all the authorities the dominating factor is the qualification of the signature; an unqualified signature raises a strong presumption of liability requiring strong evidence to rebut it. *Gadd* v. *Houghton*[14] is the only case to the contrary, and it is submitted that the facts in that case were special; the decision was based on the fact that the agents were brokers. Here the whole dispute is whether or not the respondents were brokers. The Court of Appeal in *Ariadne Steamship Co. Ld.* v. *James McKelvie & Co.*[15] treated *Gadd* v. *Houghton*[16] as if it had been decided on the basis that the signature was qualified. That case, therefore, can be distinguished.

LORD GODDARD C.J. I am clearly of opinion that this appeal must be dismissed. Though the court is deciding in favour of the respondents on different grounds, I can well understand the decision of the justices, because, of all the persons concerned in the sale of these goods, it was those who were shown to have had no opportunity for weighing the goods who were prosecuted.

[His Lordship stated the facts and continued:] The proceedings were taken under the Pre-Packed Food (Weights and Measures: Marking) Order, 1950; that order incorporates what is generally referred to as the third-party procedure which appears in the Food and Drugs Act, 1938. Article 6 (1) of the Order provides: "A person against whom proceedings are instituted in "respect of an infringement of any provisions of this Order shall, "upon information duly laid by him and on giving to the prosecu-"tion not less than three clear days' notice of his intention, be "entitled to have any person to whose act or default he alleges 'that the infringement was due brought before the court in those "proceedings and if, after proof of the infringement, the original "defendant proves that it was due to the act or default of that "other person, that other person may be convicted of the offence,

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[13] [1917] 2 K.B. 141; 33 T.L.R. 295.

[14] 1 Ex.D. 357.

[15] [1922] 1 K.B. 518; 38 T.L.R. 235.

[16] 1 Ex.D. 357.

"and, if the original defendant further proves that he has used "all due diligence to secure that the provisions in question were "complied with, he shall be acquitted of the offence." By article 6 (3): "Where it appears to the Board of Trade or any "other authority entitled to institute proceedings for an infringement of this Order that an offence has been committed in "respect of which proceedings might be instituted for an "infringement of this Order against some person and the Board "or that other authority are reasonably satisfied that that offence "was due to an act or default of some other person and that the "first-mentioned person could establish a defence under paragraph (1) of this article they may cause proceedings to be "instituted against that other person without first causing proceedings to be instituted against the first-mentioned person."

Under article 6 (1) a retailer, therefore, the person ordinarily proceeded against first, can give notice and bring in a third party, and would then have to establish the defence that the third party was liable and that he himself had exercised all reasonable care. But under article 6 (3) the local authority can, without considering whether the retailer or, for the moment, the wholesaler, has exercised reasonable care, take proceedings straight away against any person in the chain. In proceedings of this kind, although I think that there was some confusion about this point in the court below, the act or default which is proved in nearly all cases is the mere act of selling a defective article. It does not matter whether the person charged acted in perfect good faith and it does not matter whether he had been guilty of negligence or not, because it is the sale of the defective article, whatever the defect, which is the offence. These questions frequently arise in milk cases, where somebody may have tampered with milk sold by a perfectly respectable farmer but the farmer is liable if he sold the milk. Under this Order, if a person sells a tin under weight, he is liable; but he may be able to show that some other person's act or default was the real cause of the wrongful sale, and that the goods were sold to him by that other person under the wrongful description.

[His Lordship referred to the contentions in the court below stated in the case and to the opinion of the justices and continued:] With all respect to the justices, although I can very well understand their feeling that it was hard or unfair to convict the respondents who never had a chance of examining the goods, the respondents would have been liable if they had been the sellers. Often, however, cases like this are tried in magistrates' courts when the representatives who appear may not be thoroughly acquainted with commercial law and may not argue the right points, and the court thought that it had better see the contract, as it had been referred to by the justices in their case. Directly we saw the contract it became apparent at once that the respondents were not the sellers, but were simply selling as brokers. The contract begins: "Messrs. Charles Arkcoll Ld. Dear Sirs, "We have this day sold to you for account of our principals . . . "500 cartons," of these goods, and it discloses the principals as being Messrs. Sinovich, of South Africa. That shows that the respondents were selling on behalf of disclosed principals. It was a c.i.f. contract under which there was to be payment of cash against documents, marine and war risk insurance to be covered by the sellers for the c.i.f. contract price, with certain war risk provisions. The respondents undoubtedly handled some of the documents and would pass them on, but under the contract they had no right to take possession of the goods or to examine them, although, as the brokers, they sent the invoice to the buyers.

It has been argued that because the respondents did not sign the contract "as agents" they could not be heard to say that they sold only as agents. One hundred years ago, when *Lennard* v. *Robinson* [1] was decided, that might have been a very good argument, but the law has moved a long way since then. The House of Lords has said expressly that *Lennard* v. *Robinson* [1] is not correct law, and it seems to me that now the cases show that the question is whether the person signing as seller or buyer, or whatever it may be, is signing as principal or whether he is signing as agent. It does not matter whether the qualification of his liability, if he be only an agent, is found in the body of the document, or whether it is found in words added after the signature.

Atkin L.J. put the matter very clearly in *Ariadne Steamship Co. Ld.* v. *James McKelvie & Co.*,[2] where he said [3]: "But when "the assent of the party sought to be charged is proved, it matters "not what the terms of the contract expressed in the body of "the document may be. Signature unconditionally appended is "proof of unconditional assent to the terms recorded in the body "of the contract. If the body of the contract records that the "signer is a party, or leaves the name of the party to be inferred "from the signature, the signature will be proof that the signer

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[1] (1855) 5 E. & B. 125.

[2] [1922] 1 K.B. 518; 38 T.L.R. 235.

[3] [1922] 1 K.B. 518, 535.

" has assented to a contract made with him. The contract may, " however, record that the contract is made between A. and B. " acting by his agent C. and may be signed by C., in which case " C. has assented to a contract between A. and not C. but C.'s " principal B. But the assent signified by the signature may " be qualified so as to show that the signer is not assenting " unconditionally to the contract, but is assenting in a represen-" tative capacity on behalf of a principal." Later on he said [4]: " Some confusion, I think, has been introduced into the cases " by not sufficiently distinguishing between cases of construction " of the body of the contract and cases turning on the proof of " assent in the signature. There can be little doubt that the " law on the matter has not been uniformly stated and that it " has required some time to settle it. What words in the body " of the contract are sufficient to negative personal liability, and " what words qualifying signature are sufficient to negative " assent as principal were, up to 1876, in doubt. But since June, " 1876, when the case of *Gadd* v. *Houghton* [5] was decided in the " Court of Appeal by James, Mellish and Baggallay L.JJ. and " Quain and Archibald JJ., I have always understood the law to " be that the words 'on account of' and the words 'as agents' " are conclusive, when qualifying the signature to negative " liability as principal, and that whether the actual principal is " disclosed or not." A little later on he said [6]: " As is plain from " cases prior to *Gadd* v. *Houghton* [7] and from the judgment of " Archibald J. in that case, the qualification of the signature 'as " 'agents' had been usual before 1876 to negative personal " liability. That decision merely gave it final authority. To " my mind it is irrelevant to consider whether the qualifying " words occur more than once in the document on the principle " that 'what I say three times is true,' but what I say once is " doubtful. If the words qualify the signature they qualify the " assent and nothing more matters. It follows from what I have " said that in my opinion the case of *Lennard* v. *Robinson*,[8] " decided in the year 1855 while the law was still unsettled, was " wrongly decided, and should no longer be treated as an " authority."

Gadd v. *Houghton*,[9] to which Atkin L.J. referred, was a case where, according to the headnote: " Fruit brokers in Liverpool " gave a fruit merchant the following sold-note: 'We have this

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[4] Ibid. 536.

[5] (1876) 1 Ex.D. 357.

[6] [1922] 1 K.B. 518, 537.

[7] 1 Ex.D. 357.

[8] 5 E. & B. 125.

[9] 1 Ex.D. 357.

" ' day sold to you on account of James Morand & Co., Valencia, " ' 2,000 cases Valencia oranges, of the brand James Morand & " ' Co., at 12s. 9d. per case free on board . . .' and signed it " without any addition. The purchaser having brought an action " against the brokers for non-delivery of the oranges: *Held*, " reversing the decision of the Exchequer Division, that the " words ' on account of James Morand & Co.' shewed an intention to make the foreign principals, and not the brokers, liable, " and that the brokers were not liable upon the contract."

Gadd v. *Houghton* [9] was not only approved and explained by Atkin L.J.[10] but, when the *Ariadne* case went to the House of Lords, sub nomine *Universal Steam Navigation Co. Ld.* v. *James McKelvie & Co.*,[11] *Gadd* v. *Houghton* [12] was expressly approved, and must be taken to be the law. It follows, therefore, that the respondents under this contract did not acquire rights nor incur liabilities as between themselves and the buyers. They could not have brought an action against Charles Arkcoll Ld. because they would have been met at once with the statement: " You " were not the principals in this contract; there is no contractual " nexus between us because you contracted as agents for the " Sinovich company." In the same way the respondents could not have been made liable by Charles Arkcoll Ld. under the contract because there was no contractual nexus; in fact they were not the sellers. Therefore, it seems to follow clearly that there was no act or default on the part of the respondents which caused the retailers to be in possession of the goods which were under weight when the inspector bought them. If they had been the sellers, even though they had never handled the goods, they would have been liable, but as they were never the sellers, I cannot see how it can be said that there was any act or default on their part which made them liable. Mr. Wrightson argued that as the respondents held an import licence which enabled Sinovich & Co. to send the goods into this country they must be liable, but the court is unable to accept that argument. The goods were imported when there was an open licence, but we need not go into that question because, in my opinion, that could make no difference.

The result is that the justices came to a right decision on wrong grounds; but I do not want it to be thought that this court is departing from the very long line of authorities which

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[9] 1 Ex.D. 357.

[10] [1922] 1 K.B. 518, 537, 538.

[11] [1923] A.C. 492; 39 T.L.R. 480.

[12] 1 Ex.D. 357.

1953

LESTER v. BALFOUR WILLIAMSON MERCHANT SHIPPERS LD.

Lord Goddard C.J.

show that in this type of case, where mens rea is not an element of the offence—or, as I prefer to put it, where the doing of the act itself supplies the mens rea—it matters not whether the person knew that he was committing an offence or intended to commit an offence, or whether he had any opportunity of finding out whether he was committing an offence. If the respondents had been the sellers in this case they would be liable; I am glad, however, that in this case the decision which we are able to give is one which seems to me to be thoroughly consistent with justice. It is not necessary for the court to pronounce on the question whether Charles Arkcoll Ld. would have had any defence; that point does not concern the court. The only question here is whether the respondents were shown to be guilty of an act which caused these sales; in my opinion, they were not, and therefore the justices came to a right decision for the wrong reasons, and the appeal must be dismissed, with costs.

LYNSKEY and PARKER JJ. agreed.

Appeal dismissed.

Solicitors: *Sharpe, Pritchard & Co., for Town Clerk, Hastings; Neve, Beck & Co.*

J. F. L.

1953
Apr. 27.

Lord Goddard C.J., Lynskey and Parker JJ.

LINCOLNSHIRE (PARTS OF LINDSEY) COUNTY COUNCIL v. WALLACE HOLIDAY CAMP LD. AND OTHERS.

Town and Country Planning—Enforcement notice—Compliance with statutory requirements—Development before appointed day—Town and Country Planning Act, 1947 (10 *&* 11 *Geo.* 6, *c.* 51), *ss.* 23, 75.

An enforcement notice served by a local planning authority under the Town and Country Planning Act, 1947, and intended to refer to a development which had in fact been carried out before the appointed day, July 1, 1948, contained no reference to section 75 of the Act (which applies to development carried out in contravention of previous planning control) and was in fact, on its face, served pursuant to section 23 of the Act (which applies to development which has been carried out after the appointed day) in respect of development for which planning permission had not been obtained. On the complaint of the owner and occupier of the land, justices

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[Reported by Miss ELAINE JONES, Barrister-at-Law.]

quashed the notice as being bad in law. The local planning authority appealed:—

Held, that an enforcement notice under the Town and Country Planning Act, 1947, which is intended to refer to a development carried out before July 1, 1948, must be a notice under the machinery of section 23 of the Act as applied by section 75; that the notice must allege and specify the contravention of planning control said to have been occasioned by the development; that a notice which failed to do so was bad in law and might be quashed; and that the justices had power to quash the notice because the permission which was said to be lacking was not required in respect of a development carried out before July 1, 1948.

SPECIAL CASE stated by the justices for the County of Lincoln, Parts of Lindsey.

The following facts were proved before the justices: The council for the County of Lincoln, Parts of Lindsey, the local planning authority for the purposes of the Town and Country Planning Act, 1947, served upon Wallace Holiday Camp Ld., the owners and occupiers of the land referred to, an enforcement notice under the Town and Country Planning Act, 1947.[1] The

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[1] Town and Country Planning Act, 1947, s. 23 (in Part III): "(1) "If it appears to the local planning "authority that any development of "land has been carried out after the "appointed day without the grant of "permission required in that behalf "under this Part of this Act, . . . "the local planning authority may "within four years of such development being carried out, if they consider it expedient so to do having "regard to the provisions of the development plans and to any other "material considerations, serve on the "owner and occupier of the land a "notice under this section.

"(2) Any notice served under this "section (hereinafter called an 'en"'forcement notice') shall specify the "development which is alleged to "have been carried out without the "grant of such permission as afore"said or, as the case may be, the "matters in respect of which it is "alleged that any such conditions as "aforesaid have not been complied "with, and . . . may for the purpose "aforesaid, require the demolition or "alteration of any buildings or "works, the discontinuance of any "use of land, or the carrying out on "land of any building or other "operations.

. . . . .

"(4) If any person on whom an "enforcement notice is served under "this section is aggrieved by the "notice, he may, at any time within "the period mentioned in the last "foregoing subsection, appeal against "the notice to a court of summary "jurisdiction for the petty sessional "division or place within which the "land to which the notice relates is "situated; and on any such appeal "the court—(*a*) if satisfied that per"mission was granted under this "Part of this Act for the develop"ment to which the notice relates, "or that no such permission was "required in respect thereof, or, as "the case may be, that the conditions "subject to which such permission "was granted have been complied "with, shall quash the notice to "which the appeal relates."

S. 75: "(1) Where any works on "land existing at the appointed day "were carried out, or any use to "which land is put on that day was "begun, in contravention of previous notice was headed "The Town and Country Planning Act, 1947," and read, as to the relevant parts: "(1) . . . development has "been carried out (within the meaning of the above Act) by "changing the use of the said land from use for the purpose "of agriculture to use as a site or as sites for structures adapted "or used for dwelling or camping purposes and other structures "ancillary thereto; (2) no planning permission has been granted "for the said development; (3) the County Council of Lincoln, "Parts of Lindsey, consider it expedient to serve this enforcement notice upon you pursuant to section 23 of the Town "and Country Planning Act, 1947." On the back of the notice an extract from section 23 of the Act of 1947 was set out.

The development to which the notice intended to refer took place before July 1, 1948, and no complaint was made of any development after that date. Wallace Holiday Camp Ld. contended that the notice was bad in law and of no effect since it did not specify any development complained of before July 1, 1948, and that section 75 of the Act of 1947 [1] did not help the local planning authority as it merely provided the machinery whereby an enforcement notice could be served in respect of such development. The local planning authority contended that the notice specified the development which was alleged to have taken place without planning permission, and it was not necessary for the date when such development occurred to be specified, and that the notice was effective.

The justices quashed the notice on the ground that it was bad in law.

The local planning authority appealed.

Percy Lamb Q.C. (with him *William Roots*) for the local planning authority. The justices had no jurisdiction to quash this notice. Section 23 (4) of the Act of 1947 does not provide for an appeal against an invalid notice. The party seeking to have such a notice quashed must apply to the justices when summoned for not obeying the enforcement notice. The decision

"planning control, then, subject to "the provisions of this section, the "provisions of Part III of this Act "with respect to enforcement notices "shall apply in relation thereto. . . .

"(5) In relation to an enforcement "notice served by virtue of this "section, subsection (4) of section 23 "of this Act shall have effect as if "for paragraph (*a*) thereof there "were substituted the following paragraph: '(*a*) if satisfied that the "'works or use to which the notice "'relates are not works or a use to "'which section 75 of this Act applies, "'shall quash the notice to which the "'appeal relates.'"

in *Mead* v. *Chelmsford Rural District Council*,[2] in which *Perrins* v. *Perrins*[3] was distinguished as applying only to cases in which the notice was valid, was to that effect.

No provision is made by the Act for the service of a notice under section 75. That section merely supplies the machinery by which section 23 is made applicable to developments which would not otherwise be within the Act. The notice in the present case was described as a notice under section 23 because no statutory or other form of notice is prescribed.

The justices found that the development had taken place before July 1, 1948, but did not direct their minds to the question whether the use was one to which section 75 applied. Their failure to do so left them without jurisdiction, but it is further submitted that no evidence could have cured their excess of jurisdiction in quashing the notice.

Section 23 (2) requires that the notice shall specify the development and the matters in respect of which any conditions have not been complied with; the present notice contained the information required by the statute. There is no provision that the local planning authority shall specify the date on which the development was carried out, which is a matter within the knowledge of the owner or occupier of the land rather than the planning authority.

Harold Brown for the respondents. This notice was rightly quashed. Under section 23 (2) the owner or occupier of the land is entitled to a notice specifying the development of which complaint is made. The notice in the present case referred to a development under the Town and Country Planning Act, 1947. Development under that Act has a different meaning from that of development under the earlier Act of 1932.

The form of notice in cases to which section 75 applies must specify that the complaint is made under section 23, as extended by section 75, and further must inform the respondent of the exact development complained of. In this case (by the admission of the appellants' counsel before the justices) no complaint of any development after the appointed day, that is, July 1, 1948, was made.

The justices were satisfied that no permission was required for the development set out in the notice and, therefore, under section 23 (4) of the Act of 1947 they were bound to quash the notice.

[2] [1953] 1 Q.B. 32; [1952] 2 T.L.R. 700; [1952] 2 All E.R. 723.

[3] [1951] 2 K.B. 414; [1951] 1 T.L.R. 945; [1951] 1 All E.R. 1075.

LORD GODDARD C.J. delivered the judgment of the court:— This case raises a short but important question with regard to enforcement notices to be served under the Town and Country Planning Act, 1947. A number of Acts nowadays give local authorities power to serve notices in respect of various matters, and this court has on more than one occasion recently called attention to the necessity of these notices being specific and carefully drawn, strictly following the Act. Persons who are seriously affected by the notice in their property or person may thus know exactly what is complained of and what they are required to do. [His Lordship referred to sections 23 and 75 of the Act of 1947 and continued:] Section 23 of the Act deals with development which has been carried out after the appointed day, that is, July 1, 1948; but there is a provision in section 75 which enables enforcement notices to be served in respect of any contravention of previous planning control. If, therefore, any work has been carried out in contravention of previous planning control, the same class of notice containing the same requirements can be served as under section 23. It is to be noted that under section 75 (5) subsection (4) (*a*) of section 23 is altered. [His Lordship read section 75 (5).]

The notice in the present case, for which no statutory form is prescribed, has to comply with the provisions of the Act. The notice was headed "The Town and Country Planning Act, 1947"; the Act did not come into force until July 1, 1948. [His Lordship then read the enforcement notice and continued:] On the back of the notice an extract from section 23 is set out, so that people may see what the section requires. No reference is there made to section 75. Presumably, therefore, that is a notice served under section 23 alleging, or intending to allege, that development has been carried out after the appointed day, and if it has the provisions of subsection (4) apply. When such a notice has been served notice of appeal can be given and, among other things, the court can quash the notice if it appears that no permission was required in respect thereof.

When this case came before the justices it was admitted that the notice was intended to refer to a development which had occurred before July 1, 1948. Section 23, therefore, obviously did not apply, because that section refers only to development of land which has been carried out after July 1, 1948. It is said now that section 75 provides that if development has been carried out in contravention of previous planning permission, an enforcement notice must be served and then the justices can only quash according to section 75 (5) (*a*) "if satisfied that the "works or use to which the notice relates are not works or a "use to which section 75 of this Act applies."

The difficulty in adopting this argument is that no reference at all has been made to section 75 in the notice at present under consideration, and that to which an enforcement notice given by virtue of section 75 must refer is not development carried out after the appointed day without regard to permission but development carried out in contravention of previous planning control, which is quite a different thing. This notice, it is agreed, was intended to refer to a development carried out before July 1, 1948. If it is alleged that the development was carried out before July 1, 1948, the notice must be one given under section 75 of the Act, and not one under section 23, that is to say, it must be a notice under the machinery of section 23 as applied by section 75, with regard to development carried out in contravention of control, and not carried out without having obtained permission.

It is said for the appellants that the justices had no power to quash because this court has held that section 23 of the Act provides for no appeal on the ground that the notice is bad; and that the justices can, therefore, only quash or vary the notice on certain specified grounds, otherwise the objection has to be taken when a person is prosecuted. The justices, however, had power to quash here because permission under the Act of 1947 was not required in respect of a development which had been carried out before July 1, 1948. If that development was carried out in contravention of planning control which existed at that time, that should be alleged and the notice should so specify. The notice in the present case was one which would only be appropriate if the development had been carried out after July 1, 1948, without obtaining permission. The justices, therefore, had power to quash the notice because the permission which it is said was lacking in this case was not required in respect of a development carried out before July 1, 1948. For these reasons we think that the justices came to a perfectly proper decision in this case and that the appeal must be dismissed.

Appeal dismissed.
Leave to appeal.

Solicitors: *Taylor, Jelf & Co. for H. Copland, Lincoln; Clifford-Turner & Co. for Frearson, Son & Sayer, Skegness.*

1953
Apr. 28, 29.

McNair J.

JOHNSON *v.* A. H. BEAUMONT LD. AND ANOTHER. A. H. BEAUMONT LD., THIRD PARTIES.

[1952 J. 634.]

Shipping—Docks—Lighting—Signaller—Unloading—Ship unloading at jetty — Efficient lighting in hold — Relevant regulation — Two employers' personnel unloading—Both liable for absence of signaller —Indemnity—Docks Regulations, 1934 (*S.R. & O.* 1934, *No.* 279), *regs.* 3, 12, 43.

The plaintiff was employed by the first defendants as a trimmer to help in the removal of ore from the ends and wings of the hold of a ship moored at the second defendants' jetty. When sufficient ore had been moved by the first defendants' trimmers, the second defendants' signaller stationed at the hatchway warned them to take cover while a crane with a grab operated by the second defendants descended into the hold to remove the ore. During the unloading the signaller left his post to get another lamp, one of the two lights in the hold having failed, and told the crane man to remove ore from the centre where he could see. The grab, in descending, landed on the plaintiff's foot. The plaintiff claimed damages against both defendants for breach of statutory duty, alleging that the hold was not efficiently lighted contrary to regulations 3 and 12 of the Docks Regulations, 1934, and that the absence of the signalman constituted a breach of regulation 43:—

Held, that regulation 3, which required that "All places in "which persons employed are employed and any dangerous parts of "the regular road or way over a dock, wharf, or quay, forming the "approach to any such place from the nearest highway, shall be "efficiently lighted" did not apply to the lighting of a ship because that subject-matter was provided for in regulation 12.

Held, also, that the liability for the breach of regulation 43, which by paragraph (*d*) of the provisions dealing with duties in the regulations, was imposed on "every person who by himself, "his agents, or workmen carries on the processes" ("processes" including the process of unloading) plainly imposed liability on the second defendants, who were carrying on the part of the processes which above all required the presence of a signaller at the hatchway at all times. The first defendants were also carrying on part of the processes, i.e., trimming, and vis-à-vis their workmen they were also liable for failure to provide and keep in position a signalman whose presence was essential for the safety of their men in the hold.

Garrard v. *A. E. Southey & Co. and Standard Telephones and Cables Ld.* [1952] 2 Q.B. 174; [1952] 1 T.L.R. 630; [1952] 1 All E.R. 597 distinguished.

[Reported by Miss C. J. ELLIS, Barrister-at-Law.]

ACTION.

The plaintiff, James Johnson, was employed by A. H. Beaumont Ld. as an ore trimmer in a hold of the ss. *Wellington Court*, which was moored at a jetty owned by the Ford Motor Co. Ld. The plaintiff, with other trimmers supplied by A. H. Beaumont Ld., under a trimming contract with the Ford Motor Co. Ld., was required to shovel the ore from the sides to the centre of the hold. When sufficient ore had been trimmed, a signaller at the hatchway, employed by the Ford Motor Co. Ld., would warn the men below to take cover while a grab fitted to a crane operated by an employee of the Ford Motor Co. Ld. descended into the hold to remove the ore. The Ford Motor Co. Ld. and A. H. Beaumont Ld. both had foremen present, but it was clear that the operation of unloading as a whole was controlled by the Ford Motor Co. Ld., while A. H. Beaumont Ld.'s man would have a right to intervene if he saw any foolish act being committed which was likely to endanger the safety of his trimmers.

On January 27, 1951, the grab, having been in operation while the trimmers were under cover, in ascending caught the cable of one of the electric lights, as a result of which this light went out. The signaller went to get another bulb, leaving his post at the hatchway and telling the craneman that he could get some ore out from the centre of the hold where he could see. The craneman allowed the grab to descend and it came down on the plaintiff's left foot, and as a result his left leg below the knee had to be amputated.

The plaintiff claimed damages from A. H. Beaumont Ld. and the Ford Motor Co. Ld., or one or other of them, alleging breaches of regulations 3, 12 and 43 of the Docks Regulations, 1934,[1] which it was admitted were applicable to the process being performed. By the particulars in his statement of claim the plaintiff alleged that the place where work was being carried on and he was employed was by reason of the lighting failure not efficiently lighted as required by regulations 3 and 12, and that as the unloading was carried on in the absence of the signalman the defendants committed a breach of regulation 43. The plaintiff also claimed that the defendants were in breach of their common law duty, alleging that both defendants had failed to supervise the work properly and to take adequate precautions to safeguard him in his work, and he also relied as against the Ford company on actual acts of negligence by their signaller and craneman.

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[1] Docks Regulations, 1934, reg. 12: "When the processes are being "carried on—(*a*) the places in the "hold and on the decks where work "is being carried on, . . . (*c*) all parts "of the ship to which persons em- "ployed may be required to proceed "in the course of their employment, "shall be efficiently lighted, due re- "gard being had to the safety of the "ship and cargo, of all persons "employed and of the navigation of "other vessels . . ."

Reg. 43: "When cargo is being "loaded or unloaded by a fall at a "hatchway, a signaller shall be em- "ployed, and where more than one "fall is being worked at a hatchway, "a separate signaller shall be em- "ployed to attend to each fall."

Both defendants denied liability.

Damages were agreed, subject to liability, at £3,500.

John Thompson for the plaintiff.

Neville Faulks for the first defendants and third parties.

E. Ryder Richardson Q.C. and *John May* for the second defendants.

The cases cited in argument, and the relevant arguments, are referred to in the judgment.

McNAIR J. stated the facts and continued: In these circumstances, I am satisfied that the effective cause of the plaintiff's accident was really two-fold. First, the act of the signaller in leaving his post as top man to fetch the electric light bulb and in telling the crane man to grab in the centre, and secondly, the act of the crane man in lowering the grab into the hold when his top man had left his post and, accordingly, when he was without any signal from him, and when the craneman knew or ought to have known that men might be there. It seems to me that the lack of an efficient light, which is relied on as involving one of the breaches of statutory duty, was really not an effective cause of the accident but merely an incident in the story leading up to these two acts of negligence which I have described.

On these findings I have first to consider whether any such breach of statutory duty, as alleged, by either of the defendants is established. Regulation 3 of the Docks Regulations, 1934, is first relied on. [His Lordship read regulation 3 and continued:] The duty of complying with that regulation is imposed, by paragraph (*a*) of the portion of the regulations dealing with "duties," on "the person having the general management and control of a "dock, wharf, or quay," which, on the facts of this case, is clearly the second defendants, Ford Motor Co. Ld. But I feel considerable doubt, and, indeed, I am against the view, that regulation 3 has any application to the lighting of a ship. I think that it has not, because that subject-matter is provided for in regulation 12. [His Lordship read regulation 12 and continued:] The duty of complying with that regulation is imposed primarily by paragraph (*b*) of the provision relating to "duties" on "the "owner, master, or officer in charge of a ship." That is, however, subject to the qualification introduced by regulation 50, which provides: "If the persons whose duty it is to "comply with regulations 9, 10 and 12 fail so to do, then "it shall also be the duty of the employers of the persons "employed for whose use the means of access and the lights "are required, to comply with the said regulations within the "shortest time reasonably practicable after such failure." On the facts of this case, the failure of the light being due to this sudden accident, and prompt steps being taken to put it right, I cannot see that there is any evidence that, within the meaning of regulation 50, there had been any failure by either Ford's or Beaumont's to comply with the regulations "within the shortest "time reasonably practicable." Accordingly, my view is that there is no breach established of either regulation 3 or regulation 12.

I now come to regulation 43, which deals with the signaller. [His Lordship read the regulation and continued:] It has been established by the decision of the Court of Appeal in *Ashworth* v. *J. McGuirk & Co. Ld.*[1] that the obligation to employ a signaller during certain processes of unloading ships which is imposed by the regulation is not complied with by the mere contractual appointment of a man to act as signaller. The regulation contemplates that the signaller must be present whenever any act of unloading takes place, and, therefore, if a workman is injured during and by reason of the temporary absence of a signaller his employer is liable for breach of statutory duty. I need not read the passage in the judgment of Lord Greene M.R., where he sets out, if I may say so respectfully, in very cogent argument, why that is the proper construction of the regulation.

The next question is, whose duty is it to comply with regulation 43? That is provided for by paragraph (*d*) of the provision relating to "duties," where it says that it is the duty of "every "person who by himself, his agents, or workmen carries on the "processes . . . to comply with Part IV of these regulations," in which regulation 43 finds place. It is, in my judgment, quite plain that the second defendants, Ford Motor Co. Ld., were persons who, by themselves or their agents or workmen, were carrying on

[1] [1944] K.B. 1; 60 T.L.R. 14;
[1943] 2 All E.R. 446.

the processes, "processes" including the process of unloading, and they in particular were carrying on the part of the processes which above all required the presence of a signaller at all times at the hatchway. Plainly, therefore, in my judgment, Ford Motor Co. Ld. are liable to the plaintiff for breach of that statutory duty imposed by regulation 43.

As regards Beaumont's, they too, in my judgment, were by themselves or their workmen carrying on part of the processes of unloading, i.e., the trimming in the hold. There is, as I see it, no reason at all why, at any rate, vis-à-vis their workmen, they should not be held responsible for a failure to provide and keep in position a signaller, whose presence was essential for the safety of their men below.

It was argued, as I understood it, on the basis of *Garrard* v. *A. E. Southey & Co. and Standard Telephones and Cables Ld.*,[2] that inasmuch as the plaintiff had for the time being passed into the service of Ford's and had left the service of Beaumont's, Beaumont's were not liable under this regulation. But, on examination, it seems to me that the facts in *Garrard* v. *A. E. Southey & Co. and Standard Telephones and Cables Ld.*[2] were very different and quite distinct from the facts of this case. In that case the electrician in question who had been lent to another party, had passed wholly under their control and, therefore, it was reasonable to consider that, pro hac vice, they had become the servants of that second mentioned person. But, as appears from a quotation from Lord Simon's speech in *Mersey Docks and Harbour Board* v. *Coggins and Griffith (Liverpool) Ld.*,[3] a very heavy burden of proof "rests on the general or "permanent employer . . . to shift the prima facie responsi-"bility for the negligence of servants engaged and paid by such "employer so that this burden in a particular case may come to "rest on the hirer who for the time being has the advantage of "the service rendered. And, in my opinion, this burden is a "heavy one and can only be discharged in quite exceptional "circumstances." I am clear on the evidence here that that burden has not been shifted and, furthermore, in so far as Parker J. in the *Garrard* case[2] relied as a second ground for his judgment on a breach of the Building (Safety, Health and Welfare) Regulations, 1948, the particular regulation with which he was concerned there was in very different terms from regulation 43.

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[2] [1952] 2 Q.B. 174; [1952] 1 T.L.R. 630; [1952] 1 All E.R. 597.

[3] [1947] A.C. 1, 10; 62 T.L.R. 533; [1946] 2 All E.R. 345.

Accordingly, I hold that both the defendants are liable for breach of the statutory duty contained in regulation 43.

On that finding, it is not strictly necessary for me to consider the common law position, but, as it has been argued, it is right that I should deal with this matter quite shortly. In the particulars of negligence set out in the statement of claim it is said that "The defendants, or one or other of them, failed properly to "supervise the said unloading or to take adequate precautions to "safeguard the plaintiff in his said work." In my judgment, on the facts which I have stated, there was adequate supervision provided by Ford's, and as regards Beaumont's, it seems to me that once they had satisfied themselves, as they did, that a good system of work was in operation, they were under no obligation to keep continuously a foreman supervising at each hold. I think that support for that is to be found in the judgment of Lord Merriman, presiding in the Court of Appeal, in *Holt* v. *W. H. Rhodes & Son Ld.*[4] As regards the other allegations of negligence, which are allegations of negligence against the second defendants' signalman and their crane man, I think that on my findings of fact those particulars of negligence are established, and, accordingly, the second defendants would be liable at common law to the plaintiff vicariously for the negligence of their two servants, the signaller and the crane man operating the grab.

Those findings involve that there must be judgment for the plaintiff against each of the defendants for the agreed sum of £3,500, and that judgment is based primarily on my finding that both the defendants were in breach of regulation 43 of the Docks Regulations.

[His Lordship also found that by virtue of a term of the trimming contract the Ford Motor Co. Ld. were entitled to their claim for indemnity against A. H. Beaumont Ld. advanced in third party proceedings.]

Judgment for the plaintiff.

Solicitors: *W. H. Thompson; Simmons & Simmons; Dennes & Co.*

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[4] [1949] 1 All E.R. 478, 481.

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1953
Apr. 27.

Denning and Hodson L.JJ.

GREEN *v.* PORTSMOUTH STADIUM LD.

[1952 G. No. 131.]

Contract — Illegality — Statutory prohibition — Bookmaker overcharged for entrance to dog-racing track—Action to recover amounts overcharged — No remedy save by criminal proceedings — Betting and Lotteries Act, 1934 (24 *&* 25 *Geo.* 5, *c.* 58), *s.* 13 (1) (2).

No civil action for the recovery of charges in excess of the amounts authorized by section 13 (1) of the Betting and Lotteries Act, 1934, lies at the suit of a bookmaker against the occupiers of a licensed racecourse, since the obligation imposed by the section is enforceable only by criminal proceedings.

Cutler v. *Wandsworth Stadium Ld.* [1949] A.C. 398; 65 T.L.R. 170; [1949] 1 All E.R. 544 applied.

Observations of Lord Mansfield C.J. in *Browning* v. *Morris* (1778) 2 Cowp. 790, 792, considered.

Decision of Parker J. [1953] 1 W.L.R. 487; [1953] 1 All E.R. 642 reversed.

Appeal from Parker J.

The plaintiff, Frederick Bailey Green, alleged that as a bookmaker he had over a period of years, and contrary to the provisions of section 13 (1) of the Betting and Lotteries Act, 1934,[1] been overcharged by the defendants, the owners and occupiers of a dog racing course, the Portsmouth Stadium Greyhound Racing Track, licensed under the Act of 1934. He alleged that he had been charged £2 each time that he went on to the course, whereas the highest charge which the defendants were authorized by section 13 (1) to make was 11s. 3d., namely, not more than five times the amount of the admission charge to the public (which for that part of the track was 2s. 3d.).

In his statement of claim the plaintiff claimed from the

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[1] Betting and Lotteries Act, 1934, s. 13: "(1) The occupier of any "licensed track may make to a book-"maker . . . any charge for admission "to any particular part of the track "not exceeding, in the case of a "bookmaker, five times the amount ". . . of the highest charge made to "members of the public for admission "to that part of the track: . . .

"(2) If any charge other than a "charge authorized by the preceding "subsection is made to a bookmaker, "or an assistant of a bookmaker, or "if any payment, valuable thing or "favour, other than a charge so "authorized, is demanded or received "by or for the benefit of the occupier "of a track as a consideration for "facilities being given to a book-"maker for the carrying on of his "business, the person immediately "responsible and also the occupier of "the track shall be guilty of an "offence."

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defendants, inter alia, the excess fees paid by him as money had and received by them to his use.

Before Parker J. the defendants took a preliminary point of law, contending, among other things, that since section 13 was a penal section, the obligation which it imposed was enforceable only by criminal and not by civil proceedings.

Parker J., on February 19, 1953,[2] held, on the basis of the observations of Lord Mansfield C.J. in *Browning* v. *Morris*,[3] that although section 13 was a penal section and the contract made between the defendants and the plaintiff on each occasion of his admission to the stadium was an illegal contract, the parties were not in pari delicto and an action to recover the excess payments would lie, since the plaintiff's claim was not a claim under the Act but only an indirect method of enforcing the obligation under section 13.

The defendants appealed in limine on the ground that the plaintiff's statement of claim did not disclose a cause of action.

Ewen Montagu Q.C. and *E. B. McLellan* for the defendants. It is submitted by way of demurrer that the plaintiff has no cause of action. He can only get an action for money had and received on its feet by pleading, as he does in his statement of claim, that the payment was illegal; and he cannot claim his money back unless he relies on section 13 of the Betting and Lotteries Act, 1934. If the money was illegally obtained by the defendants, it must have been illegally paid. Parker J. gave judgment for the plaintiff and said that this claim was not under the Act. In my submission it is a claim under the Act.

[DENNING L.J. If it were a claim for money paid under a mistake of fact, e.g., if the plaintiff thought that the highest charge to the public was, say, 8s. 3d., he could recover, for it would not then be a claim under the Act; but you say that the court must assume that he knew the facts and the law—that he could only be charged 11s. 3d. and yet voluntarily paid £2—so that his only possible claim is that the overcharge was in breach of the statute?]

Yes. But in *Bowmakers Ld.* v. *Barnet Instruments Ld.*,[4] where the law on this point is conveniently summarized, it was decided that a plaintiff could recover only if he did not seek and was not forced to found his claim on the illegal contract or to plead its illegality in support of his claim: see *per* du Parcq L.J.[5] If he cannot make out his cause of action without showing an illegality, the court will not help him, unless he can bring himself within one of the exceptions. The plaintiff relies on the exception in the judgment of Lord Mansfield C.J. in *Browning* v. *Morris*,[6] where he observed that "where contracts or transactions are "prohibited by positive statutes, for the sake of protecting one "set of men from another set of men," the parties were not in pari delicto if one of them was a member of the oppressed class, in which case "*in furtherance of these statutes*" such a person if injured might bring an action and defeat the contract. He claims that he is within that exception; but it is surely straining common sense to describe a bookmaker as a member of an oppressed class.

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[2] [1953] 1 W.L.R. 487; [1953] 1 All E.R. 642.

[3] (1778) 2 Cowp. 790, 792.

[4] [1945] K.B. 65; 61 T.L.R. 62; [1944] 2 All E.R. 579.

In *Cutler* v. *Wandsworth Stadium Ld.*,[7] where a bookmaker wanted space on a racetrack to carry on his trade, and relied on section 11 of this same Act, the House of Lords expressly decided that the Act of 1934 is not a bookmakers' charter and was not passed for their protection: see the speeches of Lord Simonds [8] and Lord Normand [9] on the objects of the statute. Both stress the importance of considering the statute as a whole. See also the judgment of Lord Greene M.R. in the same case in the Court of Appeal,[10] that the question of construction of the statute was whether a right ought to be implied which ex hypothesi was not expressed, and that the whole statute must be looked at. It is submitted that the present case is indistinguishable from *Cutler's* case,[11] and that as the Act of 1934 is not a statute falling within the dicta of Lord Mansfield it falls within the normal law as set out in *Bowmakers Ld.* v. *Barnet Instruments Ld.*[12]

[DENNING L.J. You would argue that an action under section 13 would not lie for damages if the defendants would not allow the plaintiff to come on to the course except on payment of £2, an overcharge. Thus the real question here is whether an action for money had and received is on a different footing from every other form of action?]

The defendants do not want to concede that this is an action for money had and received, because money had and received must be for a consideration which has wholly failed, and that is not the case here.

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[5] [1945] K.B. 65, 71.

[6] 2 Cowp. 790, 792.

[7] [1949] A.C. 398; 65 T.L.R. 170; [1949] 1 All E.R. 544.

[8] [1949] A.C. 398, 409.

[9] Ibid. 413.

[10] [1948] 1 K.B. 291, 298.

[11] [1949] A.C. 398.

[12] [1945] K.B. 65.

[DENNING L.J. In *Moses* v. *Macferlan*[13] Lord Mansfield used phrases similar to those in *Browning* v. *Morris*,[14] where he said that such an action would lie " for money got through imposition " . . . or an undue advantage taken of the plaintiff's situation, " contrary to laws made for the protection of persons under those " circumstances."]

That again is relying on the statute. In an ordinary action for money had and received the plaintiff cannot succeed. He can only say that he paid the money and the statute forbade it. His only remedy was to fetch a policeman.

Robert Hughes for the plaintiff. It is conceded that on the pleadings the plaintiff on this preliminary point must bring himself within the exception of Lord Mansfield in *Browning* v. *Morris*.[14] He is certainly covered by the opening words in that the contract is one prohibited by a positive statute. In *Cutler* v. *Wandsworth Stadium Ld.*[15] the plaintiff's argument was that the defendants had given him his bare rights under the Act by allowing him to come in, but that the quality of those rights did not suit him, and he brought his action in order that the court might decide whether he was entitled to bare rights or not.

[HODSON L.J. But section 11 (2) (*b*) was invoked, and the court said: " We are not going to enforce your rights at all."]

Bookmakers cannot enforce positive rights under the Act. The present case is distinguishable from *Cutler's* case,[15] because the Betting and Lotteries Act, 1934, only comes in on one point of this action. The primary purpose of the Act was to legalize totalisators on greyhound racing tracks; but the legislature was careful not to give a monopoly to the greyhound companies running those machines, and in order to prevent unfair competition provided that the trackowners should not be interested in bookmaking. Irrespective of the decision in *Cutler's* case,[15] the plaintiff can bring himself within Lord Mansfield's ruling by showing that, though the Act as a whole was not passed for the benefit of bookmakers, certain parts of it were passed (1) so that the public might have the benefit of dealing with bookmakers on the track, and (2) so that admission charges for bookmakers should be controlled and not be too high. Those sections were for the benefit of bookmakers. The case as it stands is that the plaintiff paid his £2 and was allowed on the track, but that the payment became illegal because of the provisions of section 13.

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[13] (1760) 2 Burr. 1005, 1012.

[14] 2 Cowp. 790, 792.

[15] [1949] A.C. 398.

[DENNING L.J. As a matter of construction, section 13 (2) provides specifically for what is to happen if there is an overcharge by the occupiers, namely, that they "shall be guilty of an "offence." In modern statutes, such as those affecting rent tribunal cases, if it is intended that money overpaid shall be recoverable, the statute always says so.]

The plaintiff is entitled to say that if Parliament realized that one way of keeping bookmakers off the track would be to overcharge them, he can come under the shadow of the main provision of the Act and show that, so far as the illegality was concerned, it was an Act passed for the protection of the public and indirectly for his protection, and that he ought not to be oppressed by being made to pay more than the Act allows.

[HODSON L.J. Do you rely on section 13 or not?]

Only to the point of saying how the illegality arose.

[DENNING L.J. But is it not the crux of the case that you must pin yourself on the statute?]

In the House of Lords *Cutler's* case [15] was not dealt with on the basis of the illegal contract.

[DENNING L.J. You say only that it is money had and received?]

But only because the plaintiff can say: "The defendants "committed a breach of the Act." It is conceded that the words of Lord Mansfield "and in furtherance of these statutes" assume an importance not previously realized and rather force the plaintiff to rely on the Act. In the Rent Act cases such as *Gray* v. *Southouse*,[16] proceedings were brought "in furtherance of the "statute"; but in view of the House of Lords' decision that the whole of the statute must be looked at, it is conceded that, even though the plaintiff was oppressed and imposed upon, there is nothing more to be said.

Montagu in reply. Sections 11 and 13 of the Betting and Lotteries Act, 1934, are complementary and are there to enable the public to have the benefit of bookmakers, and anything which was said about section 11 by the House of Lords in *Cutler's* case [17] could equally well have been said about section 13.

DENNING L.J. stated the facts and continued:—In considering whether this statement of claim discloses a cause of action, it must be observed that there is no allegation that the plaintiff was under any mistake of fact, nor is there any allegation that he was under a mistake of law; nor that he was oppressed or imposed upon in any way. We must assume on this pleading that the bookmaker knew perfectly well that the only lawful charge was 11s. 3d.; nevertheless he voluntarily chose to pay £2 to the stadium, and he now seeks to recover it back. He does not claim, and cannot claim, for money paid on a consideration that has wholly failed, for he has had the consideration. He has gone on to the track and conducted his bookmaking operation there. The only ground on which he claims the money is that there was a breach of the statute in charging him too much.

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[15] [1949] A.C. 398.

[16] [1949] 2 All E.R. 1019.

[17] [1949] A.C. 398.

The question whether a breach of a statute can be made the foundation of an action depends on the interpretation of the statute itself. Section 13 of the Act, by subsection (1), specifies that no charge exceeding five times the charge to the public can be made; and subsection (2), which is the important subsection, provides that if any charge other than a charge authorized by the preceding subsection is made to a bookmaker—these are the important words—" the person immediately responsible and also " the occupier of the track shall be guilty of an offence." It is most significant that the Act does not say that the overcharge shall be recoverable. In modern statutes, such as the Rent Restriction Acts, dealing with such matters as premiums, one finds that if it is intended that an overcharge shall be recoverable the Act says so. This Act does not. It says only that the person responsible shall be guilty of an offence. The consequence of an offence is that there is a fine not exceeding £50 for the first offence, while on indictment the fine may be up to £300. Moreover, on conviction for an offence, the racecourse proprietors can have their licence taken away. On the face of the statute those are the only penalties provided in the case of an overcharge. The presumption is that where the statute provides those consequences for a breach, no other remedy is available.

It was sought to say, however, that by implication an action would lie to recover the overpayments. The decision of the House of Lords in *Cutler* v. *Wandsworth Stadium Ld.*[1] seems to me to make that proposition almost unarguable. There the House of Lords held that a breach of section 11 of the Act (which says that there shall be space provided for bookmakers) did not give rise to a civil action, but could only be enforced by prosecution for a criminal offence. That was an action for a declaration, an injunction, and damages; and it failed. The House considered the statute as a whole, and this part of the Act in particular, and said that it was not passed for the protection of the bookmakers. It is not a bookmakers' charter. It is for the regulation of racecourses, and the mode of regulation is by means of the criminal courts and not by way of civil action. Applying that decision to this case, it is clear that a breach of section 13 does not give rise to an action for damages.

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[1] [1949] A.C. 398.

But the point which impressed Parker J. was that this was not an action for a declaration or for an injunction or for damages. It was an action for money had and received, to which different considerations might apply. Reference was made to the judgment of Lord Mansfield in *Browning* v. *Morris*,[2] where he said: "But, where contracts or transactions are prohibited by "positive statutes, for the sake of protecting one set of men from "another set of men; the one, from their situation and condition, "being liable to be oppressed or imposed upon by the other; "there, the parties are not in pari delicto; and in furtherance of "these statutes, the person injured, after the transaction is "finished and completed, may bring his action and defeat the "contract." In my judgment, those observations of Lord Mansfield only apply to cases where the statute, on its true construction, contemplates the possibility of a civil action. He said that it was "in furtherance of the statutes" that the action for money had and received could be brought. Just as in an action for damages, so, also, in an action for money had and received, it is a question of the true interpretation of the statute whether an action lies so as to recover the overcharge. I see nothing in this statute to authorize such an action.

I can conceive of cases where bookmakers might themselves aid and abet a breach of the statute. Some rich bookmakers might willingly pay more than the statutory amount in order to get a privileged position for themselves as against their poorer brethren. Clearly, such people could not recover the overpayments. Nor can the plaintiff here. The breach of the statute, standing by itself, does not give rise to a claim for repayment.

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[2] 2 Cowp. 790, 792.

In my judgment this appeal should be allowed, and the preliminary objection upheld.

HODSON L.J. I agree. The plaintiff having been subjected to what he describes as an illegal overcharge in contravention of section 13 of the Betting and Lotteries Act, 1934, has tried to recover the money, saying that he is not in pari delicto with the defendants, and relies on the well-known passage from Lord Mansfield's judgment in *Browning* v. *Morris*,[2] which has already been read. The short answer to that point seems to me to be that he has not pleaded any facts tending to show that he is not in pari delicto with the defendants. If the defendants have broken the law, as far as the pleadings go, he has been as much a party to breaking it as they have.

The main argument was based, however, on the decision of the House of Lords in *Cutler* v. *Wandsworth Stadium Ld.*,[3] where the judgment of the Court of Appeal was affirmed in considering this very Act. This court and the House of Lords made it quite plain that the Act was not one passed for the benefit of bookmakers (a class of persons to which the plaintiff belongs), and there was no reason to infer from anything in the Act, it not being so expressly stated, that civil proceedings were open to anyone who complained of a breach of the Act. Criminal proceedings are contemplated, and the obligations of the Act are enforceable by criminal proceedings. It is thus not one of those Acts, such as the Factory and Workshop Act of 1878, which was considered in *Groves* v. *Wimborne (Lord)*,[4] where A. L. Smith L.J. described the Act as a public Act passed in favour of the workers in factories and workshops to compel their employers to do certain things for their protection and benefit.

The judge came to the conclusion that in the present case the plaintiff was not, as was the plaintiff in *Cutler* v. *Wandsworth Stadium Ld.*,[5] seeking to enforce directly an obligation created by the section of the Act. As his claim was for money had and received, the judge thought that although he was indirectly enforcing the obligation laid down by section 13, he was not debarred from putting forward his claim. With all respect to the judge, I do not think that there is any escape for the plaintiff from the effect of the decision in *Cutler's* case.[5] The claim for money had and received is based on the payment which is said to have been made in contravention of section 13 of the Act.

[2] 2 Cowp. 790, 792.

[3] [1949] A.C. 398.

[4] [1898] 2 Q.B.D. 402, 407–9.

[5] [1949] A.C. 398.

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The plaintiff cannot bring a civil action for breach of that section, and that is what he is seeking to do.

I agree, therefore, that the appeal should be allowed.

Appeal allowed.

Solicitors: *Brash Wheeler, Chambers, Davies & Co. for Glanvilles, Portsmouth; D. H. Browne for H. F. E. Mathews, Portsmouth.*

M. M. H.

C. A.

1953
May 21.

Evershed M.R., Denning and Romer L.JJ.

WHALL AND ANOTHER *v.* BULMAN.

County Court—Practice—Pleading disclosing no cause of action—Point not taken in county court—Appeal—Remission of case to same judge.

Particulars of claim delivered in a forfeiture action in a county court, after pleading the tenancy agreement, alleged that the defendant had, in breach of a term of the agreement, used for living accommodation rooms let as office accommodation only. The agreement as pleaded disclosed, however, no express covenant on that matter, nor any proviso for re-entry in the event of a breach of covenant. The point was not taken in the county court, and the county court judge made an order for possession. That order was made on the hypothesis that the tenancy had ended, and the sole question argued before him was as to the effect of the Rent Acts. The tenant appealed:—

Held that, in the absence of an allegation and proof of a condition or of an allegation and proof of a proviso for re-entry, no cause of action had been disclosed. The order made should be set aside and the case remitted to the same judge for a retrial.

APPEAL from Judge Rice-Jones sitting at Croydon County Court.

The following statement of facts is taken from the judgment of Evershed M.R.: The plaintiffs, William L. Whall and A. Y. Bush, were the landlords of three rooms in 46 High Street, Colliers Wood, London, S.W.19, each of which they let to the defendant, J. Bulman, by a separate letting, in September, 1952. Subsequently, they took proceedings in the county court for forfeiture of the leases, alleging by the particulars of claim that: "(i) By an oral agreement (subsequently confirmed in "writing by the defendant on September 25, 1952), the plaintiffs "let to the defendant as from September 13, for a minimum "period of fifty-two weeks the front room on the first floor of "the said premises"—and by the corresponding agreements two other rooms, at a certain rent—"as office accommodation "(the first month to be rent free). (ii) It was a term of the "said agreement that the said room should be used as office "accommodation only. (iii) The defendant has consistently used "the said room for living accommodation. (iv) A notice under "section 146 of the Law of Property Act, 1925, was served on "the defendant by registered post on January 9, 1953, requiring "him to remedy the breach of condition and to pay compensation to the plaintiffs. (v) The defendant has not complied "with such notice, and is still using the said room as living "accommodation."

There were three documents of confirmation, described as agreements, which, after giving the name and address of the plaintiffs, continued: "I, Mr. J. Bulman, agree to rent"—each document referred to a particular room described as "an office "situated above the shop premises at 46 High Street, Colliers "Wood, London, S.W.19, for a minimum period of fifty-two "weeks with the option to either renew or discontinue renting "at the end of the above period. In the event of it being the "latter I agree to give one week's notice in writing."

On that pleading the county court judge ordered that the defendant Bulman should give up possession to the landlords. The defendant appealed.

G. Rountree for the tenant.
Ripman for the landlords.

The case was not fully argued on the questions before the county court judge and to which the appeal related because the court took the point that no cause of action had been pleaded before the county court nor was any raised by the notice of appeal.

EVERSHED M.R., after stating the facts as set out above, continued: There is no doubt that the pleading alleges an agreement which, so far as material to the claim for possession, contains no term or provision other than those stated in paragraph 1 of the particulars or in the written document. It is, therefore, plain that there is, at least, no express term or covenant not to use the premises otherwise than for offices. It is also manifest that there is no allegation of any proviso for re-entry on breach of the alleged covenant. It is true that in paragraph 4 of the particulars of claim there is a reference to "the breach "of condition"; but what has gone before does not, to my mind, lay any foundation for alleging that it was a "condition" of the renting that the rooms should be used for offices only. On that matter it is, indeed, permissible to add that the findings of Judge Rice-Jones, so far as I understand them, are wholly contrary to any such contention. If I am right in my apprehension of the particulars of claim, it, therefore, follows that they disclose no cause of action as alleged, and that the court could not on that pleading make, and should not have made, an order for possession, whatever might have been said on any of the questions of fact which were debated at the trial.

The case was fought on the single point whether the letting, though described as being of office premises, was in truth a letting of those premises as and for a dwelling-house, so that the defendant would be entitled to rely on the statutory protection of the Rent Acts. No point was taken (though it was open to the defendant on his pleadings to take it) that, in the absence of an allegation and proof of a condition, or of an allegation and proof of a proviso for re-entry, the plaintiff had not pleaded a cause of action at all. Unfortunately the attention of Judge Rice-Jones was not drawn by counsel to that circumstance, and he dealt with the matter solely on the point which was debated. On that matter he concluded: "I did not think that in the first instance "the plaintiff cared how the defendant used the premises as "long as they were let as offices." On that view he came to the conclusion that the suggested defence that this was a letting of a dwelling-house was not established.

The rule has been laid down as long ago as 1891, in *Smith* v. *Charles Baker & Sons*,[1] that on appeals from the county court (which are confined by Parliament in accordance with the terms of section 105 of the County Courts Act, 1934) this court will not entertain a ground for supporting an appeal which was not taken in the court below, and that rule is one which is strictly and regularly applied in this court. The peculiarity of this case is, as I have already indicated, that the real point, which on the face of the claim is fatal to its success, was never apprehended and is not even now raised in the notice of appeal. In such very exceptional circumstances it does not seem to me that this court should allow the matter to stand. It is not a question of taking a new point in support of the appeal. The point is that the order made does not bear any relation to the claim as alleged.

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[1] [1891] A.C. 325; 7 T.L.R. 679.

Put another way, the claim alleged does not support, on the face of it, the order which was asked for and which was made. This, therefore, seems to me to be a case so exceptional in character that an exceptional remedy is called for. I think in this case that the proper course is that we should set aside the order for possession which Judge Rice-Jones made and refer the matter back for re-hearing to the same judge.

I am again departing from what is common practice in this court when a new trial is ordered. The common practice is to send the matter to another judge, a practice which, of course, does not indicate any criticism of the impartiality of the first judge. But here I deliberately suggest that the matter be referred back to the same judge because I see no reason for casting any doubt on the conclusion which he reached on the point which he considered. I am not suggesting, therefore, that he should re-try that particular point. Since, however, it is being referred back, I think that the way in which the case is further heard or a re-trial had must be a matter for the discretion of the judge himself, and, therefore, I do not seek to interfere with it. I have merely made that intimation which may guide him when he has to decide what matters he will treat as open for further argument before him. I think it right that the parties should have such liberty to amend their pleadings as Judge Rice-Jones may direct. That, again, is a matter for his discretion.

In the circumstances, I should, obviously, not be justified in expressing any further opinion on the question whether there is any covenant or condition relating to user, and whether in the absence of either this claim for possession can succeed, though these points have been discussed before us. Since the point was not taken by the defendant, either here or in his notice of appeal, it would not, in my judgment, be right to allow him costs in this court or in the court below. It is an unfortunate state of affairs, for both parties seem to me to be to blame in that, on the one hand, the plaintiff failed to put forward a sustainable cause of action, and on the other, the defendant failed to observe the fact. Unfortunately, the judge was allowed by counsel who appeared before him to deal with the matter on a false premise.

In the circumstances, the just order seems to me to be that the order for possession should be set aside and the case referred back to Judge Rice-Jones for retrial upon such terms, as to amendment of pleadings and otherwise, as he may think fit; but

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that there should be no order for costs in favour of either party in this court or in the court below on the first hearing.

DENNING L.J. When the case was opened, all the members of the court noticed at once that the claim for possession was bad, because the tenancy agreement did not contain a proviso for re-entry. It is elementary that you cannot have a forfeiture unless there is a proviso for re-entry or its equivalent. There is none such here.

What then is to be done? This point was not taken below nor in the notice of appeal. Can this court itself take it? I think so, for this reason: the case comes before the court as if the parties had said to one another, "Although there is no forfeiture clause, we agree that the court should treat the case as "if there were one." If the parties had knowingly made such an agreement, this court would not adjudicate upon it. This court is here to try real cases, not hypothetical ones. The parties cannot agree on a false hypothesis and ask the court to adjudicate upon it.

It is most unusual for this court to interfere on a point not taken below, but in this case I agree entirely with my Lord that the only thing we can do is to send the case back for retrial so that it can be determined on a real and not a hypothetical footing.

ROMER L.J. I also agree, and there is nothing that I can usefully add.

Case remitted.

Solicitors: *W. Timothy Donovan; Fairs, Blissard, Barnes & Stowe.*

E. D.

C. A.
1953
Feb. 6.

Singleton, Denning and Hodson L.JJ.

LOUDON *v.* RYDER.

Damages—Exemplary—Trespass and assault—No physical injury resulting from assault, except shock—Damages awarded not so excessive that no jury could reasonably have given them—Exemplary damages described as a "fine."

The father of the plaintiff told her that, when she came of age, she would come into property, a flat in a mews, under a declaration of trust made by him. In April, 1950, he died, and in May, 1950, the plaintiff came of age. The plaintiff's mother, a trustee, did not inform the plaintiff of her right to the flat, but the plaintiff examined the contents of a deed box at her mother's house where she found a document which showed that she (the plaintiff) had become entitled to the flat on attaining her majority. The plaintiff's mother had let the flat, but when the tenant left, the plaintiff entered the flat and took possession thereof.

On May 28, 1951, receiving information from Staines, where the mother was residing, the plaintiff barricaded the door of the flat and filled a pail half full of water. Her mother arrived at the mews in a car with a friend, the defendant. The door to the flat was found to be locked and barricaded. A ladder was procured and put up against the kitchenette window. The defendant ascended the ladder and received the contents of half a pail of water over his head. He then went up the ladder with a steel or iron bar, with which he broke one of the small panes of glass, forced open the window, and jumped into the kitchenette. He said to the plaintiff: "Go out" or "Come out: you have no business here." The plaintiff had picked up a cake knife with which to defend herself, but the defendant beat her with his fists on the shoulders and on the nape of the neck. The plaintiff meanwhile was screaming. Then the defendant pulled the plaintiff towards the stairs and dragged her down the stairs by her hair and by her head or body.

The plaintiff was seen by a doctor, who stated in evidence that there were no bruises or injuries upon her, but said she complained of some tenderness on pressure. She was suffering from shock; but apart from that there was not much wrong with her. The trespass, the wrongful eviction, and the assault took place in a period estimated at not less than 10 nor more than 20 minutes.

The plaintiff brought an action against the defendant for damages for trespass and assault. By the defence, it was alleged that the flat was not the property of the plaintiff but of her mother, but that statement was withdrawn before trial. The plaintiff was cross-examined, but the defendant did not go into the witness-box. In his summing-up to the jury Devlin J. said: "The punitive "damages are rather like imposing a fine, as if you were a bench "of magistrates and you wanted to impose a fine which made it "quite clear what view you took of a wanton and wilful disregard "of the law, or for somebody else's rights, and wished to make it "quite plain that you marked the seriousness of the offence, if it "was a serious offence, and so to show the defendant that he cannot "do that sort of thing with impunity."

The jury awarded the plaintiff £5,500 damages—for trespass £1,500, and for combined assault £4,000, in the proportion of assault £1,000, and exemplary damages £3,000.

It was contended that for the assault the jury had awarded two separate amounts for punitive damages and that the damages awarded were excessive:—

Held, that there was no misdirection by the trial judge, and that the court would not interfere with the award of damages on the ground that the damages were so excessive that no jury could reasonably have awarded them.

Dictum of Lord Esher M.R. in *Praed* v. *Graham* (1889) 24

Q.B.D. 53, 55, cited with approval by Lord Wright in *Mechanical and General Inventions Co. Ld. and Lehwess* v. *Austin and the Austin Motor Co. Ld.* [1935] A.C. 346, 378, and *Merest* v. *Harvey* (1814) 5 Taunt. 442, applied.

APPEAL from the verdict of a jury and judgment given thereon by Devlin J. in favour of the plaintiff for £5,500 damages for trespass and assault committed by the defendant.

The plaintiff's father, Mr. Lewis, in his lifetime, had told her that he proposed to leave her certain property in trust, No. 3 Coleherne Mews, in Kensington. Mr. Lewis died in April, 1950, and in May, 1950, the plaintiff attained 21 years of age. Mrs. Lewis was an executrix or trustee of her husband, and after his death she did not say anything about this declaration of trust; indeed, according to the plaintiff's evidence, her mother had told her that there was nothing for her. The plaintiff and one of her sisters, when at their mother's house after their father's death, opened and looked into a deed-box. In that box they found, inter alia, a document which showed that the plaintiff had become entitled to the flat, No. 3, Coleherne Mews, when she became 21 years of age. The plaintiff took the document out of the deed box and showed it to a solicitor whom she consulted.

Mrs. Lewis, the mother, had let No. 3, Coleherne Mews to a Mr. Loudon, to whom the plaintiff became engaged to be married. Mr. Loudon, on April 29, 1951, left the flat temporarily to go to Ireland on business, and the plaintiff went to live there. She changed the locks, and was there in possession of the flat on May 28, 1951, when she received a message from Staines, where Mrs. Lewis was then residing, "that they were going to "break into the flat." Thereupon, the plaintiff barricaded the door of the flat, which was over a garage in the mews, and filled a pail half full of water. In the course of the morning there arrived in the mews in a motor-car the plaintiff's mother, Mrs. Lewis, who remained in the motor-car, her gardener, and Ryder, the defendant. The defendant was a friend of Mrs. Lewis and spoke in broken English.

Singleton L.J., when relating the facts of the case, said: "There was another property which was called 'Shalimar,' a "bungalow at Staines where the mother was living at one time. "That property was in trust for another daughter, Sheila "Maretta. Mrs. Lewis, the mother, gave evidence at the trial "and was cross-examined, and she was asked: 'When your "'husband died you were the sole remaining trustee to convey "'"Shalimar" to your daughter? (A) Yes. (Q) That daughter

" 'had to issue a writ against you, did she not? (A) Yes. (Q) " 'And after she had issued a writ against you—and she is " 'entitled, is she not, to the freehold of " Shalimar "—did you " 'sell it to Ryder? (A) Well, it is in dispute at the moment, " 'you know, whether she is entitled to it or not. (Q) Did you " 'sell it to Ryder? (A) I did, yes.' The suggestion was made " that she had sold it to Mr. Ryder, the defendant, for much " less money than it was worth. I do not know whether that is " right or not, but at a time when the daughter was just over " 21 years of age, her mother parted with that property, or sought " to do so, and sold it to the defendant in this case. The mother " was cross-examined further as to moneys which were in building societies in the names of the daughters, and it appeared " from her evidence that though the money was in the names " of the daughters she, the mother, said that that money ought " to go to Mr. Ryder, the defendant, because it had been " deposited for Mr. Ryder's sister who had died in Poland, and " Mr. Ryder was now taking out, or had taken out, letters of " administration of the estate of his sister. Why in such circumstances the money should be in the names of Mr. and " Mrs. Lewis' daughters I do not know. That is all I know " about Mr. Ryder, except for the events of May 28, 1951, which " led to this action."

The defendant and the gardener tried to enter the flat by the door: they could not. Thereupon a ladder was found and was put up against the building so that it reached approximately to the window of the small kitchen of the flat. The gardener went up; when he got part-way up the ladder he looked and saw the plaintiff, his mistress's daughter. He came down the ladder. Ryder, the defendant, then went up the ladder. By that time the plaintiff was prepared, to an extent. She had a pail half-full of water, and when Ryder got on the ladder she threw the water, or part of it, down on him. That did not seem to have any effect. She had not time to get any more water. He advanced up the ladder with a steel or iron instrument, broke one of the small panes of glass close to the fastening, forced open the window and jumped into the kitchenette.

One Gardiner, an electrician who was working in his car opposite the flat and heard and saw what happened, gave evidence. He said that he heard screams and shouting. The defendant, as far as Gardiner could understand him, was shouting some such words as " Go out " or " Come out; you have no " business here." According to the plaintiff, she had picked up a cake-knife with which to defend herself. Ryder, the defendant, beat her on the shoulders and on the head with his fists. The plaintiff was screaming. He did not appear to have done any material physical damage to her. When he had beaten her he pulled her towards the stairs and dragged her down the stairs by her hair or by her head or body. Meantime Gardiner had gone up the ladder, and finding the defendant and the plaintiff on the stairs, he was unable to pass until they got to the bottom of the stairs. He then pushed the defendant from the plaintiff and he opened the door and they went out.

The plaintiff, when she had seen her solicitor, went to see a doctor. She had some nervous shock; she was not seriously hurt, though she had had a very unpleasant experience. The doctor was called as a witness. He said that there were no bruises or injuries upon her so far as he could find. She complained of some tenderness on pressure, but apart from the shock there was not much wrong with her.

The trespass, the wrongful eviction, and the assault took place in a period estimated at not less than 10 or more than 20 minutes.

The plaintiff brought her action claiming damages for trespass and assault.

Paragraph 3 of the defence was, "At the time of the alleged "trespass to the said premises, the said premises were not the "plaintiff's, but were the property of her mother . . . and the "defendant entered on the said premises by the command and "authority of the" mother. This paragraph of the defence was withdrawn a short time before the trial.

The plaintiff was cross-examined by counsel for the defendant, but the defendant did not give evidence. The material portions of the summing-up of Devlin J. are set out in the judgment of Singleton L.J. Having been told by the judge that it was an undefended case and that they had to assess damages, the jury awarded a total of £5,500: "for trespass £1,500 and the combined assault and exemplary damages £4,000, in the proportion "of assault £1,000, and exemplary £3,000."

The defendant appealed.

Gilbert Beyfus Q.C. and *J. C. Lawrence* for the defendant.

Fearnley-Whittingstall Q.C. and *C. H. Duveen* for the plaintiff.*

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* It is not practicable to publish the arguments on account of the untimely death of the reporter.

SINGLETON L.J., after stating the facts, continued: There was only one piece of evidence missing in this case. If the defendant had gone into the witness-box and said: "I am very sorry about "this; I did think that this was Mrs. Lewis' flat; I did think "that the girl had no right there; I am very sorry; I know that "I treated her rather badly," a different view must have been taken by the jury. But, as Hodson L.J. pointed out in the course of Mr. Beyfus' submission, if the plaintiff in a case of this nature is cross-examined at length, and if attacks are made upon her, and if then the defendant does not give evidence, a jury is apt to take an unfavourable view of the defendant. The amount of £5,500 was a very large sum of money indeed for a case of this kind. The jury were asked by the associate to give the figures of apportionment, and the answer was: "On the trespass, "£1,500, and the combined assault and exemplary damages, "£4,000, in the proportion of assault, £1,000, and exemplary, "£3,000."

Mr. Beyfus submitted to this court that the amount of £5,500 was very much too high; and, furthermore, that if the jury gave £1,000 for the assault, having regard to the circumstances in which the assault was committed, they ought not to, and could not properly, add £3,000 by way of exemplary damages. On the question of amount in general, in *Mechanical and General Inventions Co. Ld. and Lehwess* v. *Austin and the Austin Motor Co. Ld.*,[1] Lord Wright, after reciting the words of Lord Esher M.R. in *Praed* v. *Graham*,[2] said [3]: "Lord Esher adds that "the court cannot set aside the verdict merely because it is "larger than they themselves would have given, but only if "'having regard to all the circumstances of the case, the "'damages are so excessive that no 12 men could reasonably "'have given them.'"

The damages, £5,500, are much higher than I should have given had I to determine that question as a judge of first instance. I am not prepared to say, in the circumstances of this case, that they are so high that no reasonable jury could have given them, and when trial is by jury the verdict of a jury ought to be upheld, unless it is clearly shown that it is wrong in the sense that I have mentioned. The jury considered this matter after a direction from the judge. Nor am I prepared to say that the jury, in awarding £4,000 in respect of the assault, must be held to be wrong because they have said £1,000 for the assault plus £3,000 by way of exemplary damages. They have thought the matter out for themselves, and that, I suppose, was their way of arriving at the result in determining the right figure as damages for the assault.

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[1] [1935] A.C. 346.

[2] (1889) 24 Q.B.D. 53, 55.

[3] [1935] A.C. 346, 378.

Mr. Beyfus went further, and submitted that the trial judge misdirected the jury on this matter, and he referred to certain passages in the summing-up. First, I should say that Devlin J. pointed out to the jury that the decision as to the amount of damages, the appropriate amount of damages, was for them; and having told them the law in regard to an assault, he said: "If the assault is conducted in such a way as to insult the "dignity of the person who is assaulted, if it is conducted in "such a way as to invade the rights of the property that a "person is granted by the law of this country the liberty to hold "inviolate, in those circumstances the law permits a jury or a "judge, if he happens to be doing it, to go outside the measure "of compensation and assess damages, which are sometimes "called exemplary, sometimes called punitive, sometimes indig-"nant damages." Later in the course of his direction to the jury the judge said: "It seems to me, on the agreed facts of "the case, to be quite plainly a case which calls for exemplary "damages—whether they are large or small is entirely a matter "for you, but damages that are far more than nominal, in order "to mark the outrage, because I do not think there is any "doubt that it was an outrage that was committed against the "plaintiff."

It has not been suggested in this court that this was not an outrage committed against the plaintiff, and the judge's direction as to that cannot be attacked. The passage of which Mr. Beyfus makes most complaint is: "Those, members of the jury, are "the matters which you have to have regard to. May I give "you one word of advice? It cannot be more than advice, "because it is a matter entirely for you in the end. It is possible "—I do not say more than that it is possible, because I do not "know—that the circumstances of this case and the way in which "the defence has been conducted made some of you feel angry. "If that be so, do not lose your sense of proportion in the matter" —a warning to the jury not to go too far—"You have to award "damages under two heads, for compensation and, if you think "right, for punitive or exemplary damages. Under the head of "assault itself you can properly consider the circumstances of "the assault, and you will decide upon a sum which you think is

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"appropriate by way of compensation to the plaintiff for the "treatment she received, not only for the physical treatment, but "for the way in which she was treated." So far, said Mr. Beyfus, no complaint. The judge continued: "You will also consider "what sum you think is appropriate by way of punitive damages "to award against the defendant." Mr. Beyfus submitted that that was putting three heads of damage for assault: (1) the assault itself; (2) the circumstances of the assault, the way in which she was treated; and (3) punitive damages. I regard it as no more than an explanation to the jury as to how they should approach the matter.

The judge continued: "The punitive damages are rather like "imposing a fine, as if you were a bench of magistrates and you "wanted to impose a fine which made it quite clear what view "you took of a wanton and wilful disregard of the law, or for "somebody else's rights, and wished to make it quite plain that "you marked the seriousness of the offence, if it was a serious "offence, and so to show the defendant that he cannot do that "sort of thing with impunity. That is the way in which you can "regard that, if you take that view. Think of it as a fine which "has to hit the defendant hard if he has disregarded the "rights of others and show that that sort of conduct does not "pay. I do not mean, of course, that you have to arrive at two "separate sums and add them together." Mr. Beyfus submitted that it was wrong to direct the jury that this was a fine; what they had to do was to give the plaintiff compensation sufficient for the injury which she had suffered. None the less, the judge was entitled to direct the jury that they could give damages of an exemplary or punitive kind.

The judge ended his direction to the jury in this way: "You "will bear in mind all the time, of course, that you are "exercising a judicial function, and should exercise it calmly "and logically, and should keep it within what you as a body "feel to be appropriate bounds. Would you now consider your "verdict"—another warning to the jury. They were told that they could give exemplary damages or punitive damages.

That is in line with what has been said time and time again in this country on this very subject. In *Merest* v. *Harvey*[4]: "The court held that upon a declaration for breaking "the plaintiff's close, treading his grass, and hunting for game, "and other wrongs, £500 were not excessive damages for a

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[4] (1814) 5 Taunt. 442.

"trespass in sporting, persevered in in defiance of notice, and "accompanied with indecent and offensive demeanor"; and Sir Vicary Gibbs C.J., in the course of giving his judgment, said [5]: "I wish to know, in a case where a man disregards every "principle which actuates the conduct of gentlemen, what is to "restrain him except large damages? To be sure, one can "hardly conceive worse conduct than this." That case was in the year 1814. The court upheld the verdict of the jury, or refused to interfere with it. Heath J., in a very short judgment, said [6] "I remember a case where a jury gave £500 damages for "merely knocking a man's hat off; and the court refused a new "trial. . . ." That was 130 or 140 years ago. Those judgments show that the court does not lightly interfere with the verdict of a jury if there is a proper direction.

I can see no fault in the direction given by Devlin J. in this case, and though, as I have said, I should not have given so large a sum as £5,500 damages, I am of opinion that it was within the province and the power of the jury to do so, if they thought that the circumstances were such that that was the right sum. It was for their decision; it would not be right for this court to interfere. I hope that it will be known that, when juries are called upon to exercise a duty such as this, their verdict is, and ought to be, regarded as final. The more that is realized the more will they be anxious, as they always are, to view these things as they are directed to do—carefully and fully, and mindful of their responsibility. In my opinion, this appeal must be dismissed.

DENNING L.J. I entirely agree. I would only like to quote one passage from the evidence of Mr. Gardiner, an electrician, who was working in his car opposite this mews and heard and saw what happened. He said that he saw a well-dressed man making this trespass by means of this ladder and breaking in and attacking this young woman; he said that he went up the ladder to rescue her, and this is what he said he saw when he got inside: "She was holding up her hands and he was beating "her hands. I caught hold of him by the shoulders. He had "not seen me until then, and his face changed and he started "cringing in the corner and asked me what I was doing there: "'What are you doing here? It is nothing to do with you.' "I told him that he had no business to be doing things like that "in England. . . ."

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[5] 5 Taunt. 443.

[6] Ibid. 444.

I am quite sure that the jury took the same view, and I am not at all surprised at the figure of damages which they awarded. I agree that this appeal should be dismissed.

HODSON L.J. I agree, and have nothing to add.

Appeal dismissed.

Solicitors: *Adler & Perowne; Hardman, Phillips & Mann.*

C. G. M.

NEWTON AND WIFE v. BIGGS.

[Plaint N. No. 70.]

C. A.
1952
Dec. 17, 18.

Singleton, Birkett and Morris L.JJ.

Landlord and Tenant—Rent restriction—Purchase of dwelling-house—Grant to vendor by same instrument of tenancy of upper floor—Completion—Purchaser not a landlord by purchasing house—Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (23 & 24 *Geo.* 5, *c.* 32), *s.* 3 (1) *and Sch. I, para.* (*h*).

The plaintiffs agreed in writing in October, 1947, to purchase a dwelling-house from the defendant. By special condition 9 of the contract: "The purchaser shall be given vacant possession of "the ground floor with the joint use of the bathroom upstairs and "the vendor is to pay to the purchaser the sum of 23s. per week "inclusive for the upper floor of the premises." Completion was effected subsequently in accordance with the terms of the contract:—

Held, that the plaintiffs, although they became owners of the dwelling-house by purchasing it after September 1, 1939, did not become landlords of the defendant by purchasing it after that date within the meaning of paragraph (*h*) of the First Schedule to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933. Although provision was made for the plaintiffs purchasing the house from the defendant and for giving him a tenancy of the upper floor by the same written instrument, the effect was that the plaintiffs agreed that, when they became owners, at the date of completion, the defendant should become tenant of the upper floor. They did not, therefore, become landlords by purchasing the house.

The provision in paragraph (*h*) of the First Schedule to the Act of 1933 appears to be for the protection of the sitting tenant where a dwelling-house is purchased subject to an existing tenancy.

Epps v. *Rothnie* [1945] K.B. 562; 61 T.L.R. 533; [1946] 1 All E.R. 146 and *Fowle* v. *Bell* [1947] K.B. 242; 62 T.L.R. 711; [1946] 2 All E.R. 668 applied.

APPEAL from a decision of Judge Tudor Rees, sitting at Uxbridge County Court, on a preliminary point of law raised on an agreed statement of facts.

The plaintiffs, Frederick Ernest Newton and Kathleen Newton, his wife, and the defendant, William Arthur Biggs, in or about October, 1947, entered into a contract in writing whereby the plaintiffs agreed to purchase from the defendant No. 34, Colbrook Road, Hayes, Middlesex, at the price of £1,800, subject to certain conditions of sale. A true copy of the contract was annexed to the agreed statement of facts. In the contract were national and special conditions of sale. The special conditions provided for the deposit of £180 and that the date of completion should be October 31, 1947. By special condition 9:— "The "purchaser shall be given vacant possession of the ground floor "with the joint use of the bathroom upstairs and the vendor is "to pay to the purchaser the sum of 23s. per week inclusive for "the upper floor of the premises."

Completion of the purchase was effected on a date between that of the contract and the date of a notice to quit dated July 30, 1952. A full copy of that notice, duly served on the defendant on that date, was annexed to the agreed statement, and by it the plaintiffs gave the defendant notice to quit and deliver up to them the upper floor of the premises on August 9, 1952, or "at the expiration of the week of your tenancy which will expire "next after the end of one week from the service of this notice."

According to the agreed statement of facts, at the date of the service on the defendant of the notice to quit, the defendant's tenancy of the upper floor of the premises was by virtue of special condition 9 of the special conditions of sale comprised in the said contract.

The defendant, after the expiration of the term in the notice to quit, remained in the possession of the upper floor of the premises as a statutory tenant.

The Court of Appeal was informed by counsel that the solicitors who acted for both parties at the date of completion said that they had every reason to believe that completion was effected on October 31, 1947. Counsel for the plaintiffs produced a rent-book in which the first payment of rent was shown as being November 8, 1947.

The plaintiffs claimed possession of the upper floor of the premises by virtue of section 3 (1) and the First Schedule, paragraph (*h*) of the Rent and Mortgage Interest Restrictions

(Amendment) Act, 1933,[1] as amended, in that the dwelling-house was reasonably required by the landlords, not being landlords who had become landlords by purchasing the dwelling-house after September 1, 1939, for occupation as a residence for themselves. There was no evidence that suitable alternative accommodation was or would be available for the defendant. The defendant claimed that, after receipt of the notice to quit, he was a statutory tenant entitled to the protection of the Rent Restriction Acts and that the landlords had become landlords by purchasing the dwelling-house or an interest therein after September 1, 1939, within the meaning of paragraph (*h*) of the First Schedule to the Act of 1933.[2]

The county court judge gave effect to the contention of the defendant and, finding that the plaintiffs became landlords by purchase after September 1, 1939, dismissed their claim for possession.

The plaintiffs appealed.

O. R. W. Lodge for the plaintiffs.
A. Fletcher for the defendant.*

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[1] By s. 3 (1) of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933: "No order "or judgment for the recovery of "possession of any dwelling-house to "which the principal Acts apply or "for the ejectment of a tenant there-"from shall be made or given unless "the court considers it reasonable to "make such an order or give such a "judgment, and either—(*a*) the court "has power so to do under the provi-"sions set out in the First Schedule "to this Act; or (*b*) the court is satis-"fied that suitable alternative accom-"modation is available for the tenant "or will be available for him when "the order or judgment takes effect."

[2] By the First Schedule to the Act of 1933, as amended: "*Possession or* "*ejectment without proof of alterna-*"*tive accommodation.* A court shall, "for the purposes of section 3 of "this Act, have power to make or "give an order or judgment for the "recovery of possession of any dwell-"ing-house to which the principal "Acts apply or for the ejectment of "a tenant therefrom without proof of "suitable alternative accommodation "(where the court considers it reason-"able so to do) if . . . (*h*) the dwell-"ing-house is reasonably required by "the landlord (not being a landlord "who has become landlord by pur-"chasing the dwelling-house or any "interest therein after September 1, "1939, for occupation as a residence "for—(i) himself; . . . Provided that "an order or judgment shall not be "made or given on any ground "specified in para. (*h*) of the fore-"going provisions of this Schedule if "the court is satisfied that having "regard to all the circumstances of "the case, including the question "whether other accommodation is "available for the landlord or the "tenant, greater hardship would be "caused by granting the order or "judgment than by refusing to grant "it."

* Owing to the untimely death of the reporter, it is not possible to publish the argument in this case.

SINGLETON L.J. The plaintiffs on the hearing below were represented by a solicitor, and Mr. Fletcher, who appeared for the defendant, was not called upon to argue. We were told that no authorities were cited to the judge. I have no doubt that he is familiar with this class of work, but no judge can be expected to carry all the decisions under these Acts, or any other Acts, in his mind, and it would have been better if his attention had been called to the decisions which have been brought to our notice.

The real question for consideration is whether the landlords became landlords by purchasing the dwelling-house after the relevant date. This is clear: they became owners by purchasing the house after the relevant date; they became owners on completion. Before completion they had an agreement for purchase. Condition 9 of the special conditions provides that: "The purchaser shall be given vacant possession of the ground "floor with the joint use of the bathroom upstairs and the "vendor is to pay to the purchaser the sum of 23s. per "week inclusive for the upper floor of the premises." The vendor retained the upper floor, and he became tenant to the purchasers at some time; but though the purchasers became owners by purchase it does not seem to me that they became landlords by purchasing the dwelling-house. There was the condition in the agreement under which the vendor had to pay to the purchasers the sum of 23s. a week inclusive for the upper floor of the premises. On completion, the purchasers were able to give the vendor a tenancy of the upper floor of the premises which they had undertaken to give him if they purchased. They did purchase, and after the date of the purchase they handed to him a rent-book; he became their tenant; he became their tenant either by reason of the carrying out of the agreement or by the handing over of the rent-book to him in pursuance of the agreement; they did not become his landlords by purchasing the dwelling-house.

In *Epps* v. *Rothnie*,[3] Scott L.J. said[4]: "Accordingly, the "county court judge held, and in my view held rightly, that the "plaintiff did not become landlord by purchasing the dwelling-"house. He took the view, with which I agree, that the object of "the exception in paragraph (*h*) is to protect a sitting tenant from "having his house bought over his head, and that it has no "application to a case where the owner of a house purchases it "after the statutory date at a time when the house is actually

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[3] [1945] K.B. 562; 61 T.L.R. 533; [1946] 1 All E.R. 146.

[4] [1945] K.B. 562, 564–5.

"empty, and thereafter lets it to a tenant. In my opinion the "county court judge's decision was right on this point." That case was considered in the judgment of the Court of Appeal in *Fowle* v. *Bell.*[5]

In my view the bracketed words in paragraph (*h*) of the First Schedule to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, were put in to prevent someone buying a house and turning out the sitting tenant under the provisions of paragraph (*h*) of the First Schedule. In the circumstances of the present case I do not think that the words in brackets apply, for the plaintiffs did not become the defendants' landlords by purchasing the dwelling-house. It seems to me that this appeal must be allowed, and the case must go back for consideration of the other points which arise.

BIRKETT L.J. I am of the same opinion. The agreed statement of facts makes it plain that the defendant was in October, 1947, the owner of the whole of the premises, and a contract, which is apparently undated, of October, 1947, gives the date of completion as October 31, 1947, and in view of the additional information which we had as to the date of the rent-book, it would appear that completion did take place on that date, and the rent-book came into existence almost immediately afterwards. Condition 9 of the special conditions of sale reads in this way: "The purchaser shall be given vacant possession of the ground "floor with the joint use of the bathroom upstairs and the vendor "is to pay to the purchaser the sum of 23s. per week inclusive "for the upper floor of the premises."

Clearly, therefore, the defendant being the owner of the whole of the premises, there was no tenancy in existence at the time of this contract for sale, and the only question that we have to decide in this case is whether the plaintiffs here became landlords by purchase. I think the answer to that question is "No": they did not become landlords by purchase within the meaning of paragraph (*h*) of the First Schedule to the Act of 1933, as it has been interpreted by decisions of the Court of Appeal. What I think was done by condition 9 was to make it a term of the contract of sale that a tenancy would be granted, or would be created. I know that Mr. Fletcher in his argument before us this morning submitted that the plaintiffs became landlords by purchase by reason of the fact that, because of condition 9 being in the special

[5] [1947] K.B. 242; 62 T.L.R. 711; [1946] 2 All E.R. 668.

conditions of sale, the grant of the tenancy and the purchase were in fact one transaction, indivisible, and therefore by the mere act of purchase, the two transactions came into existence at the same moment of time. He submitted, therefore, that the landlords became landlords by purchase. I do not think the construction of special condition 9 supports that view. It might have been a great advantage if in the court below matters concerning the creation of this contract had been gone into if they were relevant.

In the course of the argument statements were made about what might have happened; what conditions the vendor might have laid down; what choice the purchaser had, and matters of that kind, but we are without any guidance on those matters except this agreed statement of facts and the terms of the actual contract. What we have here to decide, on the material before us, is the question which was stated by my Lord: Did the plaintiffs in this case become landlords by purchase? It is true that Mr. Fletcher said that the fact that the vendor was to pay to the purchaser 23s. 0d. a week inclusive for the upper floor of the premises was included in the same document by which the premises were to be sold, but I do not think that it by any means follows that that means that the matters are one and indivisible. I think that the plain common sense of this matter was that what was being said by the purchaser by condition 9 was:—" I will become the owner of the premises, but I will " grant and create a tenancy to you of the upper floor at this " inclusive rent of 23s. 0d. a week."

My Lord has referred to the passage which occurs in the judgment of Scott L.J. in *Epps* v. *Rothnie*,[6] and I must refer to the further consideration given to this matter by that Lord Justice in *Fowle and Wife* v. *Bell and Wife*.[7] He said: " In " considering the bracketed exception to paragraph (*h*), we must " bear in mind that it is found in an enabling provision which " confers jurisdiction on the judge to order possession to be given " to the landlord; and, therefore, if there be ambiguity in the " exception, it ought to be construed in favour of the landlord " and not against him. The phraseology seems to me neces" sarily to mean this, ' not being a landlord who in relation to " ' the tenant before the court has become that tenant's landlord " ' by purchasing the dwelling-house or any interest therein " ' after ' the given date ' for occupation as a residence.' The

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[6] [1945] K.B. 562, 564–5.

[7] [1947] K.B. 242, 246.

"exception so read would still achieve what I cannot help "thinking was the object of the exception within the brackets, "namely, to prevent an outsider first buying a house occupied "by a tenant, then giving the tenant notice to quit, and finally "coming to the court for an order to get rid of the tenant." Then the Lord Justice considered that situation.

As I have said, I think here that the answer to the question, Did the plaintiffs become landlords by purchase? is in the negative. They became owners, it is quite true, by purchase, and had they not done that they would not have been in any position to grant a tenancy of any kind, but there is a world of difference between becoming owner by purchase and becoming a landlord by purchase within the meaning of paragraph (*h*) and the authorities in the Court of Appeal, and the conclusion, therefore, to which I have come is that, on the facts as we know them in this case, the decision of the county court judge was not correct, and that this appeal ought to be allowed.

MORRIS L.J. I agree. The effect of the contract made in October, 1947, was that the plaintiffs agreed to purchase the property, and agreed that the defendant, the vendor, should have a tenancy as from the date of completion. Though the agreement for sale and the agreement for a tenancy were in the same document, and no doubt were in fact parts of one transaction, the result was that the plaintiffs agreed that when they became owners the defendant should become tenant. In those circumstances, in my judgment, the plaintiffs did not become landlords of the tenant by purchasing; they became landlords because of the agreement that they had made with the vendor that the latter should become tenant when the plaintiffs became owners.

Appeal allowed. Case remitted to county court.

Solicitors: *E. D. C. Lord, Hayes, Middlesex; Reginald Johnson & Co., Hayes, Middlesex.*

C. G. M.

C. A.

1953
Feb. 17.

Lord Goddard C.J., Morris and Romer L.JJ.

BRIESS AND OTHERS *v.* ROSHER AND OTHERS.

Company—Sale of shares—Fraud of director during negotiations—Sale authorized by members—Whether innocent shareholders liable vicariously to purchaser of shares.

Company X was permitted to manufacture and sell synthetic cream, if made in accordance with a formula approved by the Ministry of Food. By 1947 company X could not obtain enough raw material at a price which would enable the business to continue to be carried on at a profit. R., the managing director, then added water to the product, so that he did not make the synthetic cream according to the formula, but increased the bulk which was being sold. This fraud was not known to any other director nor to any shareholder of company X.

In 1948 R., without authorization, approached the directors of company Y with a view to their company buying the shares of company X. The other members of company X were quite unaware of those negotiations. R. fraudulently concealed the water fraud from the directors of company Y, and, after three months' negotiations, R. put forward to the board of company X a tentative proposal by company Y to buy the shares of company X at certain prices. The board of company X placed that proposal before the shareholders. At a general meeting, the same day, according to the minute:—"This matter was discussed very fully and it was "agreed that 'R.,' who had already been in negotiation with 'company Y,' should take the matter up further with that company "with a view to completing the transaction on the above basis."

The proposed transaction was completed. Later the directors of company Y, having discovered R.'s fraud, sued two shareholders of company X for damages, and the trial judge held that the shareholders, who had no knowledge of R.'s fraudulent concealment, were liable vicariously for it:—

Held, that the shareholders were not liable. It might be that if R. had been instructed to negotiate on behalf of the shareholders, and had been guilty of fraudulent concealment thereafter, the shareholders would have been liable. The shareholders had given no authority to R. to act as their agent to negotiate the purchase of the shares up to the time of the general meeting nor thereafter, since at that meeting the shareholders merely said that they would accept the proposed prices for the shares if company Y made their proposal into a firm offer.

Per Romer L.J.: When negotiations for the sale of shares of a company, which are often protracted, are undertaken by the directors, then according to the plaintiffs' case, if the shareholders authorize the board to carry the proposal to fruition, if it subsequently turned out that one of the board in the course of the negotiations had made a fraudulent misrepresentation for some purpose of his own, then every shareholder would be liable in damages as a result at the suit of the purchaser. There was no authority for such a proposition and such a result would be disastrous.

Decision of Barry J. reversed.

APPEAL from Barry J.

Rosher, the managing director of Nutrifood Products Ld. and a man of advanced age, obtained permission from the Ministry of Food to make synthetic cream according to a formula, requiring a certain fat content, approved by the Ministry, and any alteration in the formula had to be submitted to the Ministry for their further approval. At first all went well with the manufacture and sale of the cream but, soon after the war came to an end, prices rose, and by 1947 the company were faced with the fact that they could not obtain enough of the materials used at a price which would render the business profitable. Rosher then added water to the product, so that the synthetic cream was not being made according to the formula, but the bulk which was being sold was increased. It was not suggested that the other directors, men of the highest position and character, knew of what Rosher was doing. They trusted Rosher and had no knowledge of the fraudulent manufacture.

Economic Utilities Ld., who were customers of Nutrifood Products Ld. and had purchased a substantial quantity of their output, in 1947 had considered the purchase of the shares of that company, and had made a tentative approach to Rosher, but the matter was not then pursued. In the summer of 1948 Rosher, since he was ageing (he was in the eighties), and since he was afraid of being found out (Sir Charles McRea, a director, had recently appointed his own nominee as secretary to keep an eye on things), got in touch with some business acquaintances, one of whom, Briess, on behalf of Economic Utilities Ld., after a three months' negotiation as to price, offered to buy the shares of Nutrifood Products Ld. at the price of about 35s. each for the preference and 15s. for the ordinary shares.

On October 11, 1948, there was first a board meeting of Nutrifood Products Ld., Sir Charles McRea in the chair, and then a general meeting of the company. The minutes of the board meeting stated: "Mr. Rosher outlined a proposition which had "been made to him by Economic Utilities Ld. whereby that "company would purchase from the shareholders of Nutrifood "Products Ld. their preference shares for 35s. per share and "their ordinary shares for 15s. per share. This was discussed "very fully and in view of the difficulties being encountered in "consequence of the restricted supply of raw materials, it was "decided that the above proposition should be placed before the "shareholders." Those present at the board meeting besides the chairman and Rosher were one Harrison, an Admiral Cunningham and the secretary.

At the general meeting which followed, the chairman, according to the secretary's minute, informed the shareholders: "that the directors had received a proposition with regard to the "sale of the whole of the company's shares. At the present time "great difficulties were being encountered owing to the restricted "supplies of raw material with a consequent restriction in output "resulting in losses being incurred by the company. There were "no prospects in the immediate future of the allocation of raw "materials being increased. The proposition referred to had "been received from Economic Utilities Ld., whereby that "company would purchase from the shareholders of Nutrifood "Products Ld. their preference shares for 35s. per share and "their ordinary shares for 15s. per share. This matter was "discussed very fully and it was agreed that Mr. Rosher, who "had already been in negotiation with Economic Utilities Ld., "should take the matter up further with that company, with a "view to completing the transaction on the above basis."

In fact, on October 11, 1948, a firm offer had not yet been made, but it was made later after there had been another meeting between Rosher and one of the directors of Economic Utilities Ld. As found by the trial judge, between October 11 and October 20 Economic Utilities Ld. asked to see the balance sheet of Nutrifood Products Ld. and it was shown to them. The purchasing director had also visited the factory of Nutrifood Products Ld.

On October 20, Economic Utilities Ld. wrote: "Dear Sir, "We agree to purchase, subject to contract, the whole of your "4,762 £1 participating preference shares at 35s. per share, "total £8,333 10s. and the whole of your 4,760 one shilling "ordinary shares at 15s. per share," and after setting out the details the letter continued: "On your obtaining completed "transfers from your shareholders we will hand you in exchange "for same £12,000." It was turned into a firm offer on November 2, when they wrote: "We agree to purchase from the present "holders 4,762 £1 participating preference shares and 4,760 "one shilling ordinary shares for a total consideration of £12,000, "the consideration to include £96 10s. to defray the costs of "completing this transaction." That was accepted by Rosher on November 4: "I thank you for your letter of the 2nd inst. "agreeing to purchase from the present holders 4,762 £1 "participating preference shares and 4,760 one shilling ordinary "shares for a total consideration of £12,000 which includes "£96 10s. towards the cost of completing this transaction. I "have approached the shareholders and all have agreed. "Transfer forms have been sent to them with a request that they "will forward them duly executed to our solicitor together with "their share certificates. These are now being received and I "hope the whole of them will be to hand during next week with "the possible exception of 300 preference shares held by a share-"holder in Australia who, however, has cabled his agreement. "I have pleasure in accepting your offer as set forth above and "give you my assurance that since June 30, 1948, the company "has not entered into any transaction other than in the ordinary "course of its business." Thereupon the transfers were duly executed and the shares passed to the plaintiffs in these proceedings.

Rosher's fraud having been discovered, the plaintiffs, directors of Economic Utilities Ld., brought an action for damages in respect of that fraud in which judgment was given by Barry J. against Rosher and two former shareholders of Nutrifood Products Ld. One of the shareholders, Sir Charles McRea, having died, his executors became parties to the action. It was not contended that any shareholder of Nutrifood Products Ld. was himself guilty of fraud, but that they were liable to the plaintiffs in damages on the ground of vicarious liability.

The defendant shareholders appealed. The Court of Appeal was not asked to set aside the finding of fraud against Rosher.

Cyril Salmon Q.C. and *C. H. Gage* for the defendant shareholders.

Gerald Gardiner Q.C. and *Neil Lawson* for the plaintiffs.*

LORD GODDARD C.J. [after stating the facts:] The shareholders of Nutrifood Products Ld. were told at the general meeting of the company on October 11 by their chairman that the company had received the information that Economic Utilities Ld. were willing to buy their shares at 35s. each for the preference shares and 15s. each for the ordinary shares. The information came from Rosher, though the chairman did not say so. The shareholders said: "We accept that price. Will Rosher "kindly complete the transaction." The language of the minute is that of the secretary, and the minute was signed by the chairman at the next meeting. It does not seem to me that Rosher either asked for or obtained any authority to negotiate on behalf of the shareholders. A proposition had been received and the shareholders, thinking that it was favourable to them, said that they would accept it in exactly the same way as the board had said at the earlier board meeting. The trial judge seems to have found that in between October 11 and 20, 1948, the intending purchasers did ask to see the balance sheet and that it was shown to them. Mr. Gardiner has relied very strongly on that, because he said that a fraudulent misrepresentation once made is a continuing misrepresentation and that this showing of the balance sheet really amounted to a fresh fraudulent concealment. I do not think that that is so. The representation had been made once and for all, and no doubt Rosher allowed the plaintiffs to remain under the impression that this material which was being manufactured was material which could be lawfully sold, and that it was in accordance with the Ministry of Food specification. That is the real fraudulent misrepresentation in this case. The fact that he showed them the balance sheet would only confirm the figures which he had given them, the figures which he said the company were making and which no doubt they were making. The fraud was not that they were not making these figures, but that the product which they were selling was one which at any minute the Ministry of Food could come down and stop them making and could have prosecuted the directors for making.

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* Owing to the untimely death of the reporter, it is not possible to publish the argument in this case.

It is now said that the shareholders, who were innocent of any fraud in the matter, and had no knowledge of any misrepresentations which had been made, and were in the dark about the defects of this substance which the company was manufacturing, are liable in damages to the purchasers, and the trial judge so held. He has held that they are liable on the doctrine of vicarious liability—that is to say that, because their agent was fraudulent, the shareholders were fraudulent. I need not go into the question of what would have happened if fraudulent misrepresentations had been made by Rosher after the meeting of October. It may be that the shareholders, if Rosher had been told to negotiate on their behalf, would have been liable. But, in truth, I think that the matter comes to no more than this:

Rosher, who for his own purposes and to serve his own ends had no doubt made fraudulent misrepresentations to the plaintiffs, simply told the shareholders that he could procure 35s. each for the preference shares and 15s. each for the ordinary shares. Thereupon, no matter how exactly the minute is worded, these shareholders said: "We will take it, you get us that money." I cannot see, therefore, that the shareholders can be made to disgorge this money, because they were no party to the fraudulent misrepresentations. They did not give any authority to Rosher to act as their agent to negotiate this purchase. They were led by Rosher to believe that the thing was a fait accompli to the extent that he had it in his bag and that if they said that they would accept it they would get their money.

Some effort has been made in this case to support the plaintiffs' case on the ground of ratification. I am afraid that I cannot understand how ratification applies here. The defendants, of course, by taking the money and transferring the shares have ratified Rosher's act in procuring the sale of the shares, but I cannot see how it can be said that they have ratified Rosher's fraudulent misrepresentations, of which they knew nothing and could know nothing. It has been pointed out to us that in the result it is very hard luck on the plaintiffs, in that the defendants have obtained money which they would not have got had it not been for Rosher's fraudulent misrepresentation. On the other hand, if one were seeking to balance up the merits of the case and trying this case on the ground of which of these two innocent persons should suffer for the fraud of a third person, the shareholders knew it was being sold to this company, which is in the trade, and it seems to me that they would have been entitled to say: "Well, we imagine that if these people are buying the shares, "they know what they are buying. They could have easily found "out what they were buying." The purchasers trusted Rosher and did not apparently make use of an analyst or make any trade inquiry. They did not apparently look at the formula from the Ministry of Food. Everybody in the trade must have known that at that time there were numbers of orders under some regulation or other providing that one had to get the approval of the Ministry of Food to the manufacture of these substitute foods. I base my judgment on the ground that, so far as I can see, the minute of the general meeting in October does not give Rosher authority, or purport to give him authority, to negotiate on behalf of the company. It gave him authority to accept what was being offered, a sum of money which he said that he could get for these shares.

For these reasons, I think that the appeal should succeed.

MORRIS L.J. I am of the same opinion. The company, Economic Utilities Ld., had been customers of Nutrifood Products Ld. The trial judge held that Economic Utilities Ld. had been purchasing from Nutrifood Products Ld. a very substantial quantity of their output. Economic Utilities Ld. was described by Fisher, who was a witness, as a company whose business was that of wholesale distributors for the bakery and ice cream trade, and food distributors generally. Fisher was a director of that company. In 1947 there had been talk about a purchase of the shares in Nutrifood Products Ld. Fisher in that year had apparently made some tentative approach to Rosher. Nothing came of that, and Fisher's recollection is that in the following year, 1948, the return to the matter was made by Rosher. Doubtless the reason was that he realized full well what the situation was, and that he thought that matters could not go on as they were. There is no doubt that there were substantial sales of the product, and the figures in the balance sheet and in the accounts were genuine as figures. The real fraud, as my Lord has pointed out, was that the product was not actually being made in accordance with the formula at all.

So it came about that in 1948 Rosher and Fisher were again in touch with each other, and there was a meeting at Rosher's club. Discussion took place as to a sale of the shares. There is no doubt, and it was so held by the trial judge, that the other directors of Nutrifood Products Ld. were at that time quite unaware of what was going on. They did not know anything about the meeting, and it is quite plain that they never knew or suspected that the whole business of the company was carried on in a dishonest manner, namely, by purporting to manufacture in accordance with the formula, but in fact by the addition of water producing goods in such quantity as to yield the profits that were made. The directors first heard of the offer for the shares in October, 1948. Fisher said that in the talks which he had had with Rosher the latter made it quite clear that the shareholders did not then know of the negotiations. It seems to me that when the matter was put to the directors at the board meeting in October it was put to them as a proposition that the shareholders could sell their shares at the price of 35s. each for the preference shares and 15s. each for the ordinary shares. It is true that various events took place after the date of that meeting. There was the meeting of October 20, and there was a visit to the factory on October 25, but, in my judgment, everything really had been done before the date of the general meeting which followed the board meeting, and what the shareholders were told, after the directors had first been informed to that effect, was that they could sell their shares at the prices named. They never knew that there was anything wrong. They never knew that there had been any fraudulent concealment. They never authorized any fraudulent concealment. They were simply told of this offer for the shares and, in my judgment, what in effect happened was that they said that they would accept the offers made. I agree with what my Lord has said, that liability for the concealment by Rosher is not established. I therefore agree with the judgment which my Lord has delivered.

Romer L.J. I also agree. One aspect, so far as I can see, of the plaintiffs' case here would have very far-reaching consequences, because in these cases, which are by no means uncommon, where it is found that all, or substantially all, the shares of a company are being bought by some third person, the negotiations, which are often of a very protracted character, are necessarily undertaken by the directors. The reason for that is that it is very inconvenient, if not impossible, for each shareholder to negotiate with a prospective purchaser who wants either all the shares or, at all events, something in the region of 90 per cent. Therefore the negotiations are undertaken by the board, as they must be. As far as I can make out, if the plaintiffs were right, the following very serious position would arise. The directors of a company, having secured something in the nature of what was in the present case described in the minute as a "proposition" to buy all the shares at X pounds, place that before the meeting of the shareholders and tell them that that is the proposition which the directors have managed to find. The shareholders, on hearing that, authorize the board, who have been in charge of the negotiations, to carry the proposition to fruition, and the directors do so. If it subsequently turns out that one of the board, in the course of the previous negotiations, has made a fraudulent misrepresentation for some purpose of his own, then, on the plaintiffs' contention, every shareholder would be liable in damages as a result at the suit of the purchaser. No authority is forthcoming to support that proposition, and in the absence of it I am quite unable to accept it. The result would be disastrous. In this very case we have a large bundle of transfers, how many I do not know, and if the plaintiffs are right every single one of those transferors would be liable in damages for something which he knew nothing about, and liable for the whole amount. There are some companies, of course, where a far larger number of shareholders is concerned than the considerable number with which this case is concerned. For my part, I am wholly unable to accept the argument put forward. For the rest, I entirely agree with what my Lords have said.

Appeal allowed.

Solicitors: *Woolley, Tyler & Bury; Buckeridge & Braune.*

C. G. M.

C. A.

1953
Jan. 20.

Denning and Morris L.JJ. and Roxburgh J.

PASMORE *v.* WHITBREAD & CO. LD.

[Plaint No. H. 70.]

Landlord and Tenant—Compensation for goodwill—Carrying on by the tenant or his predecessors in title of a trade or business for not less than five years—Sale of business within five years—Surrender of old tenancy—Grant of new tenancy—Meaning of "his predecessors in title"—Landlord and Tenant Act, 1927 (17 *&* 18 *Geo.* 5, *c.* 36), *ss.* 4 (1), 5 (1) *and* 25.

The words "predecessors in title" in section 4 (1) of the Landlord and Tenant Act, 1927, which provides that a tenant on quitting a holding shall be entitled to be paid compensation by his landlord for goodwill if he proves "that by reason of the carrying "on by him or his predecessors in title at the premises of a trade "or business for a period of not less than five years goodwill has "become attached to the premises," do not mean predecessors in title of the business but of the legal interest which the tenant holds in the premises. Accordingly, where the tenant, who had bought the goodwill of the business of a garage, did not obtain an assignment of the vendor's tenancy of the premises where the latter had carried on the business for nearly three years, but himself obtained a new tenancy of the premises from the landlords and continued to carry on there the business of a garage for a period of less than five years before the expiration of a notice to quit, he had failed to prove that he "or his predecessors in title" had carried on the business for not less than five years and could not sustain a claim for compensation for goodwill.

Reasoning in *Williams* v. *Portman* [1951] 2 K.B. 948; [1951] 2 T.L.R. 526; [1951] 2 All E.R. 539 followed.

APPEAL from a judgment of Sir Gerald Hurst Q.C. sitting at the Bromley County Court as a tribunal for the purpose of Part I of the Landlord and Tenant Act, 1927.[1]

One Fordham held a quarterly tenancy of premises under the Act of 1927 from Whitbread & Co. Ld., which he used for the purposes of a garage business from 1946 to 1949. In August, 1949, Pasmore (the appellant) entered into negotiations for the purchase of the business from Fordham with the object of taking over the premises. In the course of the negotiations the question arose whether Pasmore should take an assignment from Fordham of his tenancy or whether Fordham should surrender his tenancy to Whitbread & Co. Ld., the landlords, who would then grant a new tenancy to Pasmore. The landlords, by their solicitors, made it plain that they were unwilling to consent to an assignment by Fordham to Pasmore of the tenancy, but that, on Fordham surrendering his tenancy, they were prepared to grant a new tenancy to Pasmore, and the transaction was carried out in that way.

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[1] Landlord and Tenant Act, 1927, s. 4: "(1) The tenant of a holding to "which this Part of this Act applies "shall, if a claim for the purpose is "made in the prescribed manner— "(i) in the case of a tenancy ter"minated by notice, within one month "after the service of the notice on the "tenant; and (ii) in any other case, "not more than 36 nor less than 12 "months before the termination of "the tenancy; be entitled, at the ter"mination of the tenancy on quitting "the holding, to be paid by his land"lord compensation for goodwill if he "proves to the satisfaction of the "tribunal that by reason of the carry"ing on by him or his predecessors "in title at the premises of a trade "or business for a period of not less "than five years goodwill has become "attached to the premises by reason "whereof the premises could be let at "a higher rent than they would have "realized had no such goodwill "attached thereto: . . ."

S. 5 (1): "Where the tenant "alleges that, though he would be "entitled to compensation under the "last foregoing section, the sum "which could be awarded to him "under that section would not com"pensate him for the loss of goodwill "he will suffer if he removes to and "carries on his trade or business in "other premises, he may in lieu of "claiming such compensation, at any "time within the period allowed for "making a claim under the said sec"tion, serve on the landlord notice "requiring a new lease of the pre"mises at which the trade or business "is carried on to be granted to him."

S. 25 (1): "For the purposes of this "Act, unless the context otherwise "requires . . . the expression 'pre"'decessor in title' in relation to a "tenant or landlord means any person "through whom the tenant or land"lord has derived title, whether by "assignment, by will, by intestacy, "or by operation of law. . . ."

Pasmore bought the business from Fordham. He paid Fordham £1,625 for the goodwill, fixtures and fittings, and of that sum from £625 to £1,000 was attributable to goodwill. Fordham surrendered his tenancy to the landlords, who granted a new quarterly tenancy to Pasmore, the transaction being completed in October, 1949, and Pasmore carried on the business he had bought. On November 24, 1951, the landlords gave Pasmore three months' notice to quit, expiring on February 26, 1952, and, within one month after the service of that notice, the tenant, Pasmore, claimed compensation or, alternatively, a new lease under sections 4 and 5 of the Landlord and Tenant Act, 1927.[1]

He alleged that by reason of the carrying on by him or his predecessor in title at the premises of the trade or business of a garage for a period of not less than five years, goodwill had become attached to the premises by reason whereof the premises could be let at a higher rent than they would have realized had no such goodwill attached thereto.

The question arose whether Pasmore and his predecessors in title had carried on business at the premises for the requisite period of five years. The business of a garage had been carried on at the premises continuously for more than five years, but not by Pasmore. The only question, therefore, was whether Fordham was a predecessor in title of Pasmore or, in other words, whether the words "predecessors in title" in section 4 (1) meant predecessors in title to the goodwill of the business or predecessors in title to the tenancy.

The referee in his report said: "The words are 'predecessors "'in title' and I do not take the view that they are apt to cover "merely a continuance of a business, although maintaining the "same goodwill. The words connote a title to the premises. It "appears to me that the legislature cannot properly be held to "have covered a case like the present whether its intention and "policy were to do so or not."

Judge Sir Gerald Hurst Q.C. agreed with that view and dismissed the tenant's application.

The tenant appealed.

Percy Lamb Q.C. and *N. R. King* for the tenant.

Rodger Winn and *A. C. Warshaw* for the landlords.*

* Owing to the untimely death of the reporter, it is not possible to publish the argument in this case.

DENNING L.J. stated the facts and continued:—The one question in the case is whether Pasmore is entitled to claim the benefit of the Landlord and Tenant Act, 1927. Have he and his predecessors in title carried on business at the premises for not less than five years ? He has carried it on himself from 1949 to 1952, two-and-a-half years. Fordham carried it on for some three years before him. Together they have carried it on for more than five years. But was Fordham the predecessor in title of Pasmore ?

Mr. Lamb contends that the words "predecessors in title" in section 4 (1) of the Landlord and Tenant Act, 1927, properly construed, mean predecessors in title to the business. He says that Fordham was the predecessor in title of the business. Indeed, the goodwill of the business was sold to Pasmore and paid for by him. On the other hand, Mr. Rodger Winn says that "predecessors in title" means predecessors in title to the tenancy, that is, to the legal interest in the premises. In determining this question, section 25 defines the expression "pre-"decessor in title." [His Lordship read the definition.] It seems to me, as Morris L.J. pointed out in the course of the argument, that the expression must mean the same in relation to a tenant as in relation to a landlord. In relation to a landlord it clearly means predecessor in title to the property, not to the business. So, also, in relation to the tenant it must mean, and its natural meaning is, predecessor in title to the property, to the interest of the tenant, the legal interest which he holds.

That meaning was assumed to be correct in this court in *Williams* v. *Portman*.[1] Sir Raymond Evershed M.R. said[2]: "It is obvious that emphasis might appropriately have been "directed to the interest in the business rather than the title "to the property; but, whatever might have been done, Parlia-"ment chose language which this court must construe to the "best of its ability." It seems to me that there is no escape from what is the plain meaning of the phrase "predecessors in "title," that it must mean the predecessors in title to the interest of the tenant in the premises.

So in this case it comes to this: if Fordham had in fact assigned his tenancy to Pasmore then Fordham would have been a predecessor in title of Pasmore; but Fordham did not assign his tenancy; he surrendered it to Whitbread & Co. Ld. and that company granted a new tenancy to Pasmore. That means that Fordham was not a "predecessor in title" to Pasmore. Mr. Lamb said that this construction might lead to consequences which were most unjust. I appreciate that it is very hard on Pasmore in this case. Indeed, as Mr. Lamb has pointed out, the policy adopted here by Whitbread & Co. Ld., the landlords, means that they have an easy way out of the Landlord and Tenant Act, 1927. If the landlord grants leases, each for three years, to a series of successive tenants, then, although a business carried on on the premises may well increase in value with each tenant, none of them gains any rights under the Act: no one of them can say that his predecessor is a "predecessor in title" to him. Each can call in aid only his own tenancy. I ought to say, however, that the policy of the landlords was not devised in any way to evade the provisions of the Act of 1927. Long before the passing of the Act, indeed, ever since 1915, their policy has been to say: "We do not like one tenant assigning "his tenancy to another; we much prefer that the earlier tenant "should surrender his tenancy and that we should grant a new "one to his successor." That is their policy, and that is what they have done. The effect of it is that the previous tenant is not the predecessor in title to the new tenant; and the result is that the Act does not operate unless the new tenant has been there himself for five years. It is very hard on a tenant like Pasmore when he has paid a very substantial sum for goodwill, and I hope that in future tenants taking a new tenancy will realize that they have not secured any right to compensation under the Act of 1927 until five years have passed, and, therefore, that the amount which they pay to their predecessor in the business ought to be scaled down accordingly. I would willingly have decided in favour of the tenant if I could find any escape from the wording of the Act, but I cannot do so, and, in my opinion, the appeal should be dismissed.

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[1] [1951] 2 K.B. 948; [1951] 2 T.L.R. 526; [1951] 2 All E.R. 539.

[2] [1951] 2 K.B. 948, 952.

MORRIS L.J. I agree. The point which has been submitted to us was stated very succinctly in the report of the referee: "But the question is whether the words used in the Act—sections "4 and 25—are apt to cover a case where there was clearly no "assignment, but a cancellation of an old, and grant of a new, "tenancy." The referee went on: "The words are 'predecessors "'in title,' and I do not take the view that they are apt to "cover merely a continuance of a business, although maintaining "the same goodwill. The words connote a title to the premises. "It appears to me that the legislature cannot properly be held "to have covered a case like the present whether its intention "and policy were to do so or not." I am in agreement with the way in which the referee stated his recommendation in that passage.

As my Lord has pointed out, *Williams* v. *Portman*,[3] in this court, proceeded on the basis that the phrase "predecessors in "title" had reference to the title to the property. Sir Raymond Evershed M.R. referred in his judgment to the language of the Act, and said[4]: "It may well be (and, I think, this is not said "for the first time) that the language selected in section 4 was "not entirely happy, seeing that the subject-matter with which "Parliament was dealing was compensation for goodwill attached "to premises as the result of the carrying on at the premises of "a particular business for a particular period of time." On the language to be found in the statute it seems to me that we cannot here uphold Mr. Lamb's submission. I think that there is force also in what was submitted by Mr. Rodger Winn that the word "title" is not the word that would normally be used in reference to the ownership of a business.

I am in full agreement with all that my Lord has said and I think that this appeal cannot succeed.

ROXBURGH J. I agree.

Appeal dismissed

Solicitors: *Vivash Robinson & Co.; Martineau & Reid.*

C. G. M.

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[3] [1951] 2 K.B. 948.

[4] Ibid. 952.

BATES *v.* PARKER.

C. A.

1953
Feb. 18, 27.

Lord Goddard C.J., Morris and Romer L.JJ.

Negligence — Invitor and invitee — Window cleaner — Accustomed to steady himself by fixed plywood pane when on ladder—Bolts securing plywood withdrawn by householder—No knowledge of window cleaner's habit—Injury to window cleaner.

The plaintiff cleaned the defendant's windows regularly. One of the windows of the first floor at the back of the house, above a yard, had three panels and in the centre panel a pane had been removed and a piece of plywood substituted which had an aperture in the middle, where originally there had been a ventilation fan. This piece of plywood was bolted into the sides of the panel. The plaintiff, a partner of the window-cleaning firm, when cleaning the outside of the three-panel window, used a telescopic ladder and when standing on this and cleaning the outer two panels was accustomed to steady himself by holding on to the plywood with the aperture in the middle which furnished for him a ready and inviting handhold. The defendant being minded to glaze the space occupied by the plywood had removed it a few days before February 18, 1949. He replaced the plywood with the hole in it, but did not bolt the plywood to the sides of the panel and did not warn the plaintiff of the condition of the loose plywood.

On February 18, 1949, the plaintiff, when standing on the ladder, put his hand through the aperture in the plywood when the plywood moved or fell, and this caused him to lose his balance and he himself fell and was seriously injured. It was not established that the defendant knew of the plaintiff's practice of steadying himself by means of the plywood:—

Held, that the defendant was not liable to the plaintiff in an action based on *Indermaur* v. *Dames* (1866) L.R. 1 C.P. 274; (1867) L.R. 2 C.P. 311. The plaintiff was an independent contractor, and, where a householder employs such a contractor to do work, be it cleaning or repairing, on his premises, the contractor must satisfy himself as to the safety or condition of that part of the premises in which he is to work. It is left to the contractor to decide how and in what manner he will perform his task. If the window cleaner had been injured by some defect in the premises of which the householder had knowledge and which had nothing to do with the work for which he was employed, then the case might come within the principle of *Indermaur* v. *Dames*.

Per Morris L.J., he must not be taken to assent to the submission that, if it had been established at the trial that the defendant knew that it was the practice of the plaintiff to use the aperture in the plywood when bolted to the panel as a means of steadying himself, there would have been no liability on the defendant; and *per* Romer L.J., in that case it would have been the defendant's duty to have warned the plaintiff of the instability of the plywood, and, if he did not do so, he would have been answerable for the consequences.

Christmas v. *General Cleaning Contractors Ld.* [1952] 1 K.B. 141; [1951] 2 T.L.R. 1218; [1952] 1 All E.R. 39, followed.

Decision of Lynskey J. reversed.

APPEAL from a judgment of Lynskey J. at Birmingham Assizes.

The plaintiff carried on his business as a window cleaner in partnership with another man, and had been employed by the defendant, who had a small hairdressing shop in Birmingham over which he lived, to clean the windows of the premises back and front every fortnight, the usual day for his visit being a

Friday. One of the windows at the back of the house on the first floor had three panels. In the middle panel there had been originally a dormer window. The dormer, a considerable time ago, had been taken out, leaving the bottom part glazed, and in the place previously occupied by the dormer a fan had been installed for ventilation purposes. The fan was held in position by a square of plywood, in the centre of which the fan was fixed, and the plywood was bolted to the sides of the panel. In front of the fan on the outside there was a grille to prevent any great amount of dust getting through into the house.

Some considerable time before the day of the accident, Friday, February 18, 1949, the fan had been removed, but the plywood remained bolted in position with an aperture in the centre. According to the evidence of the plaintiff, and the Lord Chief Justice considered that the trial judge must have so found, the window had continued in that position ever since the plaintiff had begun to clean the defendant's windows in 1947. There was a dispute between the parties as to when the grille had been removed, the plaintiff saying that it had never been there since he cleaned the windows, and the defendant saying that he had only removed the grille a few days before the accident. There was no specific finding by the trial judge on that issue, but it was clear that the grille was not there on February 18, 1949. The defendant, being minded to glaze the space occupied by the plywood, had removed it a few days before that date. He then cut a piece of glass to fit the space occupied by the plywood, but finding that the shop at which he dealt was temporarily out of putty, he replaced the plywood with the hole in the centre of it, but he did not bolt the plywood into the sides of the panel, and he did not warn the plaintiff of the condition of the loose plywood.

The plaintiff's evidence was that when he came to clean that window, standing on a telescopic ladder, he had been in the habit of placing his hand upon or in the plywood to steady himself when he desired to clean the glass panels on either side of the centre panel. The defendant was present in the yard on one or two occasions when he had been cleaning the panel window. On Friday, February 18, 1949, he put his hand through the hole in the plywood; the panel moved or fell and this in turn caused him to lose his balance, and he himself fell and was seriously injured.

The defendant's evidence was that he had no knowledge that the plaintiff adopted that method of securing his balance.

The plaintiff, alleging that the injuries which he had sustained were caused by the window frame being in a dangerous, unusual and unsafe condition, of which he, the plaintiff, had no notice or warning, claimed damages from the defendant, who denied liability.

Lynskey J. held that the plywood, being in that condition, amounted to an unusual danger or trap of which it was the defendant's duty to warn the plaintiff, and that the defendant had not warned the plaintiff. His Lordship accordingly gave judgment for the plaintiff for £2,300 damages.

The defendant appealed.

Stephen Chapman and *Miss H. M. Shore* for the defendant.

R. K. Brown for the plaintiff.*

Cur. adv. vult.

February 27. LORD GODDARD C.J. There was no finding by the trial judge whether the defendant knew that the plaintiff was accustomed to steady himself by means of the plywood, and I do not think that there was any evidence that would justify a finding that the defendant did know of this practice on the part of the plaintiff. The most that can be said is that the plaintiff said that the defendant, when in the yard, had seen him at work on one or two occasions when he, the plaintiff, had his hand on or through the plywood. The defendant's evidence was that he had no knowledge that the plaintiff adopted this method, but in any case I do not think that, even assuming that the defendant was in the yard on occasions when the plaintiff was cleaning the window, that fact would bring home to him that the plaintiff was adopting a system, if I may so put it, of steadying himself by this means. I need not, therefore, stay to consider what the position would have been had the defendant been affected with this knowledge.

The defendant, who was unrepresented below, contended before us that it was not his duty to warn the plaintiff of the fact that the plywood panel was unbolted, and reliance was placed on his behalf on *Christmas* v. *General Cleaning Contractors Ld.*,[1] a case which counsel for the plaintiff very properly cited to the court below. The judge said that, but for that case, he would have regarded the case on trial as quite a simple matter, and he went on to say that he thought the decision referred to depended entirely upon the particular facts of that case. That, also, was a case of a window cleaner in which a window, being ill-balanced, came down upon the cleaner's hand and caused him to overbalance and fall. In allowing the appeal by the occupiers of the premises, Denning L.J. said [2]: " What, then, is the law on this " matter? Is a householder responsible for seeing that windows " are safe for window cleaners to hold on to? I think not. The " householder is concerned, of course, to see that the windows are " safe for his servants to open and close, and indeed to clean, " but he is not concerned to see that they are safe for a window " cleaner to hold on to. The duty which a householder owes " to his servants is much higher than that which he owes to a " window cleaner, who is only an invitee. The householder " employs the window cleaner as an independent contractor to " clean his windows, and leaves it to him to decide how he shall " do it and what safeguards he shall take, whether he shall use " ladders or cradles or simply stand on the sill. The householder " does not know what strains or stresses the window cleaner is " going to put on the window. If the window cleaner chooses to " rely on the window for his safety, then it is for him to take " steps to see that it is safe for his special purposes, and not for " the householder to do so. The window cleaner had no right " to expect the windows to be in perfect condition. Windows, " which are often quite serviceable for ordinary purposes, may " yet have some minor defect, such as rusty screws or worn " sash-cords, or ill-balanced weights, making them unsuitable " for window cleaners to put their trust in. Such defects are, for " window cleaners, common recognizable dangers of everyday " experience and cannot be classed as 'unusual.' They are " therefore dangers against which window cleaners must provide " their own safeguards. They cannot saddle the householder " with damage which results from them: see *London Graving* " *Dock Co. Ld.* v. *Horton.*[3] In my opinion, therefore, the " judge was wrong in finding the club liable, and their appeal " should be allowed."

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* Owing to the untimely death of the reporter, it is not possible to publish the argument in this case.

[1] [1952] 1 K.B. 141; [1951] 2 T.L.R. 1218; [1952] 1 All E.R. 39.

In my opinion the law thus laid down is not peculiar to window cleaners, nor does it depend simply on the facts found in that case. The decision, in my opinion, is that where a householder employs an independent contractor to do work, be it of cleaning or repairing, on his premises, the contractor must satisfy himself as to the safety or condition of that part of the premises on which he is to work. He is left to himself to decide how and in what manner he will perform his task.

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[2] [1952] 1 K.B. 141, 148.

[3] [1951] A.C. 737; [1951] 1 T.L.R. 949; [1951] 2 All E.R. 1.

Lord Goddard C.J.

Whether he is to put his ladder in one place or another, or to shift it or, instead of shifting it, to stretch and endeavour to support himself with his other hand, is a matter for him to decide. In the present case it is clear that had the plaintiff chosen to move his ladder a foot or so to right or left he could have cleaned the panels on either side of the plywood in perfect safety. Equally, had he wished to carry out the operation as he did, he could have tested the plywood to see whether it was firm before he used it as a support before leaning over to clean the other window. It was not, as it seems to me, for the defendant to tell him how he was to do it, or to call his attention to the fact that the piece of plywood was not in a condition to serve as a support.

Mr. Brown put the case very attractively for the plaintiff when he said that a decision in favour of the defendant would be tantamount to saying that the rule in *Indermaur* v. *Dames*[4] did not apply to window cleaners. The answer to that is that if the cleaner had been injured by some defect in the premises which had nothing to do with the work for which he was employed, as, for instance, if a staircase up which he was going to get to the first floor windows inside the house had been to the knowledge of the householder in a defective condition, it would have been the duty of the latter to warn him. To take another instance: if a builder were employed to do repairs on the roof of a house, I think that it would be for him to decide how he would carry out the work and to find out for himself whether a chimney stack or other portion of the building which he might wish to use as a support for himself or his staging were satisfactory and safe for that purpose. Where I differ from the trial judge is that I think that he has imposed on the defendant the same duty vis-à-vis an independent contractor as he would owe to one of his servants. To my mind the decision in *Christmas* v. *General Cleaning Contractors Ld.*,[5] is conclusive of this case, so far as this court is concerned, and I would allow the appeal.

Morris L.J. When the plaintiff went to the defendant's premises to clean the windows it was for the plaintiff to decide how he would set about his task. With his experience as a window cleaner and with the skill of his trade he would neither expect nor perhaps welcome any advice from the defendant as to method and procedure. The plaintiff was not a servant of any contracting firm or company, and there was no employer who owed to him the duties which, as laid down by the House of Lords in *General Cleaning Contractors Ld.* v. *Christmas*,[6] must be discharged by an employer of window cleaners. The plan which a window cleaner in the position of the plaintiff at any particular moment adopts must depend, therefore, upon his own view, acting as an independent contractor, as to what in the particular location and situation is demanded by considerations of safety and efficiency. In choosing his plan, in reference to the particular task which confronts him, such a window cleaner will have his own personal knowledge of his own individual methods and will know whether he proposes to place any measure of dependence upon the strength and stability of any part of the window that he is to clean. As it is he, and not the occupier of the premises, who knows the quality and extent of the support which at any particular moment he will require, so it is for him to ascertain whether the required support is available.

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[4] (1866) L.R. 1 C.P. 274; affirmed in Exch.Ch. (1867) L.R. 2 C.P. 311.

[5] [1952] 1 K.B. 141.

In my judgment the decision of this court in *Christmas* v. *General Cleaning Contractors Ld.*,[7] which affirms the principles to which I have referred, governs the present case unless it can be shown that in the present case there is some special distinguishing feature. It is said that the plaintiff was in the habit of relying for support upon the plywood, the aperture in which provided a ready and inviting hand-hold, and that the defendant in replacing the plywood, without bolts or fastenings, in its previous position, caused a trap to come into existence. It is said that the plaintiff was entitled to expect that the plywood, which on the day of the accident looked just as it had looked for a long time, had not been robbed of its stability. So it is urged that the defendant had created for the plaintiff an unusual danger of which he (the defendant) knew.

To those contentions Mr. Chapman, for the defendant, submitted two answers: firstly, that it was not established that the defendant ever knew that the plaintiff placed reliance upon the plywood as a hand-hold, and secondly, that even if the defendant had so known he was under no duty to warn the plaintiff, for the plaintiff should continuously during the course of his work satisfy himself of any hand-hold before depending upon it.

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[6] [1953] A.C. 180; [1953] 2 W.L.R. 6; [1952] 2 All E.R. 1110.

[7] [1952] 1 K.B. 141.

Was there, then, in the present case something which ought to be regarded as an "unusual danger?" In his speech in *London Graving Dock Co. Ld.* v. *Horton*[8] Lord Porter said[9]: "I think 'unusual' is used in an objective sense and means "such danger as is not usually found in carrying out the task or "fulfilling the function which the invitee has in hand, though "what is unusual will, of course, vary with the reasons for "which the invitee enters the premises." In his speech in the same case Lord Normand said[10]: "I am of opinion that if the "persons invited to the premises are a particular class of trades-"man then the test is whether it is unusual danger for that "class." Applying those tests it seems to me that the presence of the unsecured plywood cannot in itself and taken by itself be regarded as an unusual danger. In the *Christmas* case Denning L.J. said[11]: "Windows, which are often quite service-"able for ordinary purposes, may yet have some minor defect "such as rusty screws or worn sash-cords, or ill-balanced weights, "making them unsuitable for window cleaners to put their trust "in. Such defects are, for window cleaners, common recog-"nizable dangers of everyday experience and cannot be classed "as 'unusual.' They are therefore dangers against which "window cleaners must provide their own safeguards."

It cannot be said that the piece of plywood was in any way intrinsically dangerous or, indeed, that there was peril that unless touched it would fall from its place or, indeed, that any harm would be likely if it did. If the unusual danger is thought to lie in a change in the situation in that previously to the day of the accident the plaintiff would have held on to plywood which was fixed, but that on the day of the accident he would be holding on to plywood that was not fixed and would no longer give support, then it seems to me that, so far as the defendant knew, there was no change in the situation, for it is not shown that the defendant knew that the plaintiff had been in the habit of holding on to the plywood. Nor do I think that it can be said that the defendant ought to have known this, for it was no part of his function or duty to ascertain or to guess exactly how the plaintiff did his work. It follows, therefore, that the defendant did not know that danger lurked for the plaintiff and that it cannot be said that the defendant ought to have known.

[His Lordship considered the evidence and continued:—] The judge accepted the evidence of the plaintiff that the plywood in the period before the accident had no grille over it, and accepted that the plaintiff had been in the habit of using the circumference of the aperture as a convenient hand-hold. Because of what the defendant did the judge held that "the "result was to create not merely an unusual danger but what "in effect became to the plaintiff a trap, because what appeared "and had been safe up to February 4 by February 18 had "become, although apparently safe, completely dangerous, if it "was used as a hand-hold at all. The result is that I am satis-"fied here that the defendant had created an unusual danger "and, of course, knew of that unusual danger. In these "circumstances there was a duty upon him either to warn the "plaintiff or to fence the danger so that it could not cause the "plaintiff injury." When the judge said that the defendant knew of the unusual danger he must, I think, having regard to his other findings, have meant not that the defendant knew or realized that he had created danger for the plaintiff, but knew of the alteration he had made to the plywood which the judge held constituted for the plaintiff an unusual danger.

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[8] [1951] A.C. 737.

[9] Ibid. 745.

[10] Ibid. 752.

[11] [1952] 1 K.B. 141, 148.

With all respect, I do not find myself able to share the conclusions of the trial judge. The defendant did not foresee any danger to the plaintiff, and I do not consider that it should be held that he ought to have foreseen danger. The plaintiff was expected to clean the glass panes and had to do nothing with the piece of plywood. The defendant did not know that the plaintiff would hold on to or would have any contact with or reason to touch the plywood, though he appreciated that in the course of his work the plaintiff might touch and so dislodge the plywood. Therefore, even if on the special facts of this case it can be said that vis-à-vis the plaintiff an unusual danger was in fact in all innocence and ignorance created by the defendant, nevertheless it ought not to be held that the defendant failed to exercise reasonable care to prevent damage to the plaintiff from that unusual danger, since the defendant did not know of any unusual danger and could not reasonably have been expected to know of any unusual danger.

For these reasons, I think that the appeal should succeed. I do not find it necessary to express an opinion in regard to Mr. Chapman's second point, but I must not be taken to assent to the submission that, if on the special facts of this case it had been shown that the defendant knew that the plaintiff would use the plywood as a hand-hold, even then there would have been no liability.

Romer L.J. I agree that this appeal should be allowed. I think myself that the present case differs in its circumstances from *Christmas* v. *General Cleaning Contractors Ld.*[12] in one material respect. In that case the defect which caused the plaintiff's injury was in the window itself, and was accordingly one which he, being familiar with the construction of windows and their peculiarities, might reasonably have foreseen if he had thought about it; in other words, the danger was not an unusual one vis-à-vis an invitee who was on the premises in the capacity of window cleaner and for the purpose of doing a job as such. In the present case the plaintiff's fall from his ladder was not strictly due to any fault or defect in the window which he was engaged in cleaning at the time. The accident was caused by the fact that what he believed, from previous experience, was a secure hand-hold, namely, the hole in the plywood, turned out on that occasion to be loose and insecure. I do not think that this danger was of a kind that should be more apparent to a window cleaner than to anybody else, for the possibility of its existence was merely a matter of general common sense. Accordingly, as I say, this case differs in that respect from the facts which were present in *Christmas's* case.[12] Nevertheless, the following passage from the judgment of Denning L.J. in that case (which my Lord has already cited) seems to me to be destructive of Mr. Bates' attempt to render Mr. Parker liable for the accident which befell him. "The householder," said Denning L.J.,[13] "employs the window cleaner as an independent "contractor to clean his windows, and leaves it to him to decide "how he shall do it and what safeguards he shall take, whether "he shall use ladders or cradles or simply stand on the sill."

The Lord Justice was indicating in those observations that an employer is entitled so to act and, applying what he said to the case which is before us, it was for the plaintiff to decide upon the manner in which he should clean the defendant's window and, in particular, whether he should (as he very well could) run the ladder up at each side of the window in turn. Had he adopted that course he would not have had to resort to the plywood at all and the accident would not have happened. It appears to me that the position would have been different if it had been established at the trial that the defendant knew that it was the plaintiff's practice to use the hole in the plywood as a means of steadying himself. For on that hypothesis it seems to me that it would have been the defendant's duty to have warned the plaintiff that the hand-hold was no longer safe; he knew that the plaintiff was coming on the Friday as usual, and his failure to warn him of an invisible danger which he (the defendant) had himself brought about since the previous visit, would have been tantamount, in my judgment, to inviting the plaintiff into a concealed trap, and I think that the defendant would have been answerable for the consequences. The judge did not find that the defendant was unaware of the plaintiff's practice of gripping the plywood. On the other hand, he did not find (and I think that he would have so stated had he formed that view) that the defendant was aware of the practice, and the defendant himself swore that he was not. That denial (which was in answer to a question put by the judge himself) was in conformity with his earlier evidence that it never occurred to him that the plaintiff was in danger on the morning of the accident, and was in no way inconsistent with the plaintiff's evidence that the defendant had on one or two occasions been in the yard and seen him cleaning the window; for even if the plaintiff had at the time been holding on to the plywood (which he might not have been doing), it by no means follows that a detail such as that would have impressed itself on the defendant's mind. Accordingly, it is impossible, in my opinion, to deal with the case on the footing that the defendant knew of the practice which ultimately led to the plaintiff's accident.

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[12] [1952] 1 K.B. 141.

[13] Ibid. 148.

In conclusion I would like to associate myself with what my Lord has said in his judgment as to the general scope and effect of the judgment of Denning L.J. in *Christmas's* case[14] so far as it was concerned with the appeal by the club. The observations of the Lord Justice cannot be regarded as confined to window cleaners but extend, in my judgment, to all cases in which independent contractors are employed for the purpose of repairing or cleaning premises and the method of performing the work is left to them.

I agree that the appeal should be allowed.

Appeal allowed.

Solicitors: *Whitelock & Storr for Sidney G. Brown & Deasington, Birmingham; Caporn & Campbell for T. H. Ekins & Son, Birmingham.*

C. G. M.

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[14] [1952] 1 K.B. 141.

1953
May 19;
June 8.

Pilcher J.

H. E. DANIELS LD. *v.* CARMEL EXPORTERS AND IMPORTERS LD.

Arbitration—Contract—Sale of goods—Right to submit "any dispute" arising out of the contract—Separate arbitrations on different disputes—Two awards—Res judicata—Question of law—Failure to state a case—Failure of motion to set aside—Final award binding.

Contracts for the sale and purchase of a quantity of China Star aniseed stipulated that quality should be "about as per sealed "sample" and provided for the incorporation of the terms and conditions of Standard Form No. 1 of the General Produce Brokers' Association, which incorporated the Association's Rules and Conditions of Sale dated January 29, 1945, and provided that "any "dispute arising out of the contract shall be settled by arbitration "in London according to the Rules of the Association." The buyers claimed arbitration on the ground of defect of quality, and an award was made in their favour. Later, the buyers, alleging the discovery of a hidden fault in the goods, claimed a second arbitration on the ground of misdescription. The sellers refused to participate in the arbitration, stating that the contract had already been arbitrated once and that the case was res judicata. Under the Rules and Conditions of Sale an arbitrator was appointed by the association to act for the sellers, and a second arbitration took place at which an award was made in favour of the buyers. The sellers' contention that the matter was res judicata was before the tribunal. The sellers refused to accept or recognize the second arbitration, and the buyers brought proceedings to enforce the award:—

Held, that the agreement of the parties to submit "any dispute "arising out of the contract" to arbitration covered every dispute except a dispute whether there was ever a contract at all (*Heyman* v. *Darwins Ld.* [1942] A.C. 356; 58 T.L.R. 169; [1942] 1 All E.R. 337); that the second dispute was clearly one arising out of the contract which the parties were bound to submit to arbitration, and that the sellers, having failed to exercise their right to require the arbitrators to state their award in the form of a special case for the court on the question of law as to the arbitrators' jurisdiction, were unable to impugn the final award on any ordinary ground, and the award in the second arbitration was therefore conclusive against them.

Had the defendants taken steps to have the award in the second arbitration stated in the form of a special case raising the res judicata point they might well have been entitled to succeed under the rule in *Conquer* v. *Boot* [1928] 2 K.B. 336; 44 T.L.R. 486, which was indistinguishable on its facts from the present case and in which it was held that all damages resulting from one and the same cause of action must be assessed and recovered at one time.

[Reported by Miss ELAINE JONES, Barrister-at-Law.]

Action to enforce an arbitration award.

By contracts dated March 25 and 26, 1952, the defendants contracted to sell and the plaintiffs to buy two parcels of China Star aniseed. The contracts provided that quality should be "about as per sealed sample in selling brokers' possession." It was further provided that the contracts should be read and construed as incorporating the terms and conditions of the appropriate current form of contract issued by the General Produce Brokers' Association. The appropriate form was Standard Form No. 1, which provided for the incorporation of the Rules and Conditions of Sale of the Association dated January 29, 1945, and also stated that "Any dispute arising out "of this contract shall be settled by arbitration in London, "according to the rules of the association."

On May 13, 1952, the plaintiffs, who had accepted and paid for the goods, claimed arbitration on the ground of defect of quality, and on June 11, 1952, awards were made that the sellers should pay the buyers an allowance of 8s. 9d. per hundredweight.

On August 1, 1952, the plaintiffs wrote to their brokers complaining that, according to the information of a buyer from them, the aniseed was of a bastard quality, originating in Japan, called "religiosum," and containing poison, and they contended that that amounted to a hidden fault. The letter was forwarded to the defendants, who replied by letter on August 14, 1952, that the matter had been settled once by arbitration at which the samples had been inspected, and that they were therefore unable to give it further consideration. The plaintiffs, in a letter of August 20, 1952, pointed out that the previous arbitration had been as to quality and not as to description of the goods tendered. They then proceeded to appoint an arbitrator and, the defendants having refused to appoint one, the association, under rule 62 of their rules, appointed an arbitrator to act for the defendants. When notified of that appointment and of the proposed date of the arbitration, the defendants, by a letter of January 6, 1953, refused to participate in any arbitration or to recognize or accept an award, if made, on the ground that the contract had already been arbitrated once and that the case was res judicata.

The second arbitration took place, and on January 22, 1953, the arbitrators made an award in favour of the plaintiffs for, in substance, the whole value of the goods on the ground that they did not conform to contract description. The correspondence setting out, inter alia, the defendants' contention that the matter was res judicata, was before the tribunal.

The defendants moved the court to set the award aside on two grounds, one of which was that the arbitrators had no jurisdiction. The motion came before Lord Goddard C.J. on March 3, 1953, who held that the matter was not one which could be dealt with on motion.[1] The plaintiffs then brought the present proceedings to enforce the award.

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[1] *Carmel Exporters and Importers Ld.* v. *H. E. Daniel Ld.*

Lord Goddard C.J., on that motion, after holding that the second award was not bad on its face, said: A much more interesting point, and it is Mr. Duveen's main contention, is that the arbitrators could not hold a second arbitration on the description or quality of the goods, because there had already been one arbitration, and he said that that was an arbitration in which the cause of action was breach of contract, failure to deliver goods of the contract description; and he based himself very largely, I think, upon considerations which were much discussed in *Conquer* v. *Boot* [1928] 2 K.B. 336, and I need only read one passage from Talbot J.'s judgment in that case, in which he said, at p. 343: "There is one contract and one "promise to be performed at one "time, although no doubt the defen-"dant may have failed to perform it "in one or in many respects."

The court there held that, as there was only one contract, and the cause of action was breach of that one contract, one could not bring successive actions for several breaches of the contract; one must allege the breach when one brought the first action—that was the cause of action—and whether one included in one's particulars all the matters which one might include was neither here nor there; damages must be assessed once and for all.

Let it be assumed at once that there is a good deal to be said for Mr. Duveen's argument: it may be that he is right; but the question is how that point is to be raised. His clients did not appear before the arbitrators; they took the view that there was nothing to arbitrate about, and that they would not go to arbitration. It seems to me that it cannot be said that the arbitrators had not jurisdiction, because they were handed a contract in which it was provided that the dispute which had arisen should be determined by arbitration. Undoubtedly there was a dispute here, and therefore I think that the arbitrators had jurisdiction to inquire, or may have had jurisdiction to inquire, unless some point was brought to their attention that ousted their ability to make an award.

The real point, I think, which arises in this case is that the sellers desired to say: You cannot hold a second arbitration, because an arbitration has been held under that submission, and if an arbitration has been held under that submission you cannot hold another arbitration for the same cause of action, or the same cause of arbitration, which has already been the subject of a former arbitration. That is analogous to a plea of res judicata, although I think that Mr. Roche is quite right in saying that technically it is not a plea of res judicata, because there is no judgment, and in an arbitration the plea would be accord and satisfaction, and the buyers' rights, if any, have been entirely satisfied by the first award. But can that point be taken on a motion to set aside the award? If I were to hold that, it seems to me that I would be holding something directly contrary to what was decided in *Oil Products Trading Co. Ld.* v. *S.A. Société de Gestion d'Entreprises Coloniales* (1933) 150 L.T. 475. The court decided in that case that if a party brings a motion to set aside an award it can only do so if there was a submission to arbitration; one cannot move to set aside an award if at the same time one is saying, as I

T. G. Roche for the plaintiffs. The argument against the plaintiffs will, no doubt, be based on *Conquer* v. *Boot*,[2] in which it was held that a court cannot entertain two actions on the same cause. Should this rule apply to arbitrations, however, the two arbitrations in this case were based on different promises—the first arbitration was in respect of breach of warranty of quality, and the second on the ground of misdescription. It is accepted that *Conquer* v. *Boot* [2] was rightly decided on the facts in that case, but *Brunsden* v. *Humphrey* [3] shows that two separate causes of action may arise where two distinct rights have been violated. Breach of contract is a comprehensive term and may refer to many breaches giving rise to many causes of action. In the present case one cause was for breach of a collateral warranty of quality, the other for breach of a condition as to description. According to *Conquer* v. *Boot*,[4] the right to the second arbitration would have been lost if the plaintiff could have claimed under

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understand it, that there was no submission and no arbitration ought to have been held. It may be that the procedural point that the court there seemed to adopt was that if one wanted to raise a question that the award was for some reason or another null and void, and it was not a matter of misconduct of an arbitrator or of the award being bad on its face (which, of course, are well-known grounds for setting aside an award) one must take other proceedings or defend proceedings. For instance, if a person had never agreed to be bound by arbitration at all and had never submitted any point to arbitration, but suddenly found that an award had been made against him, he could take one of two steps: he could either bring an action for a declaration that he was not bound by the award, and possibly asking for an injunction to prevent the other side from proceeding upon the award, or he could wait until he was sued on the award, or steps were taken to enforce the award, and then defend those proceedings. In this case I am told that an action to enforce the award has already been started, and I think, therefore, it will be open to Mr. Duveen's clients to defend that action on the ground that the arbitrators were wrong in holding this arbitration, because he will say that there has already been an arbitration, and that that exhausted the buyers' rights; the property then passed, and the buyers would receive compensation, and there is nothing more that the sellers would be called upon to do. If, of course, they had attended the arbitration, I have no doubt—when I say I have no doubt, that, perhaps, is not quite right, and I think that I had better be rather more guarded—I think that it is highly probable, and it seems to me that it would have been eminently suitable that a special case should have been stated upon this point, but what the court may be able to decide on a special case, and what a court may be able to decide upon a motion to set aside an award, are two different things.

The motion was accordingly stayed until the action had been decided, the costs of the motion to depend upon the result of the action.

Roche. Might I tell your Lordship that "Religiosa" is so named because it grows in deserted temples, and not for any other reason.

[2] [1928] 2 K.B. 336; 44 T.L.R. 486.

[3] (1884) 14 Q.B.D. 141.

[4] [1928] 2 K.B. 336; 44 T.L.R. 486.

misdescription in the first arbitration. The arbitrators in the first dispute were not, however, entitled to consider any dispute save as to quality.

The arbitration clause in the present contract is in the widest form, and covers "all disputes arising out of the contract." According to *Heyman* v. *Darwins Ld.*,[5] the only disputes which are excluded under such a clause are disputes as to the existence of the contract. The rules of the Association provide for arbitrations as to quality, condition and residuary matters. In the second arbitration the plaintiffs alleged a dispute as to misdescription arising out of the contract. Although the defendants refused to participate in the second arbitration, their defence of res judicata, estoppel or accord and satisfaction was set out in correspondence which was before the arbitrators. The defendants had an opportunity of asking the arbitrators to state a case on the question of law whether that defence was sound, but did not do so. They cannot now resist the award by saying that the arbitrators were acting outside their jurisdiction.

Claude Duveen Q.C. for the defendants. The plaintiffs' claim is resisted on three grounds: (1) There was no agreement to arbitrate on separate defects. (2) There was no submission to the arbitration. (3) At the time of the second arbitration the matter was res judicata. It is conceded that in the case of a contract for the sale of goods the parties may bind themselves that there shall be different arbitrations in respect of different defects. It is submitted, however, that the warranty of quality in the present contract shows that the defendants did not intend to agree to more than one arbitration. They are, therefore, entitled to take up the position that once there has been an arbitration the right to arbitrate is exhausted. If that is right, the defendants were entitled to refuse to submit to the second arbitration. There was no valid submission; and the defendants are not prevented from taking the point as to jurisdiction in this court because the second award was a nullity: *Oil Products Trading Co. Ld.* v. *S.A. Société de Gestion d'Entreprises Coloniales.*[6]

The rule in *Conquer* v. *Boot*[7] applies to this claim, and res judicata is a good answer. There was one promise to deliver the goods by a certain date. The Statute of Limitations runs from the date of delivery no matter how long afterwards the defect was discovered showing that the contract is regarded in law as one promise. In an action at common law the plaintiffs would have had to plead misdescription and failure as to quality alternatively. This claim should be dismissed on the ground that, after the first arbitration, the plaintiffs were estopped from alleging that the goods did not comply with description.

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[5] [1942] A.C. 356; 58 T.L.R. 169; [1942] 1 All E.R. 337.

[6] (1933) 150 L.T. 475.

[7] [1928] 2 K.B. 336; 44 T.L.R. 486.

Roche, in reply. Two separate questions have to be considered. Was the claim in the second arbitration barred by the first arbitration? Is it now open to the defendants to take this point? As to the first question, it is said for the defendants that the same rules apply to arbitrations as to actions. Res judicata is a merger of every claim which constitutes the same cause of action in the judgment: Bullen and Leake, 3rd ed., p. 624. A contract for the sale of goods contains a number of different promises, and different causes of action may arise on the same contract, either founded on different promises or because the breach is different. The doctrine of res judicata can be invoked only as to judgments, for the judgment is a contract of a higher degree. With regard to arbitrations, there is a merger only because an undertaking to observe the awards of the arbitrator is implied into the contract. The plaintiffs could be bound only as to quality by the first award, for that was the only matter with which the arbitrators, on that occasion, were competent to deal.

As to the second question, the plea of res judicata was a defence and nothing more, and the arbitrator's decision on this defence was subject to the guidance and amendment of the court by way of case stated and in no other way.

Cur. adv. vult.

June 8. PILCHER J. stated the facts and continued: It is now desirable that I should refer shortly to some of the Rules and Conditions of Sale of the Association, which were incorporated in the contract of sale. Part II of the rules deals with arbitration. Rules 40–75 in this part are headed "General," and rules 76–84 are headed "Quality or condition "of goods." Rule 49 (a) is: "A written contract containing an "agreement between parties privileged under these rules to "submit any disputes which may arise in the future to arbitra-"tion in accordance with the Rules of the General Produce "Brokers' Association of London shall be deemed to contain an "implied agreement by all parties to submit to arbitration in "accordance with these rules and an implied undertaking to be "bound by and observe the award of the arbitrator, arbitrators "or umpire and any interlocutory directions given or order made "by him or them."

Rule 62: "Save as provided in rule 77 hereof each party "shall appoint his own arbitrator from persons on the panel and "shall inform the other party through the broker of the appointment. If one of the parties shall fail so to do, the party who "has appointed his arbitrator shall require the broker to call "upon the other party so to do within two clear business days "following the date on which the notice is given. If at the "expiration of the said two days the other party has still failed "to appoint an arbitrator, the party who has appointed his "arbitrator shall instruct the broker to apply to the secretary "of the Association for the appointment of an arbitrator. The "request for the appointment shall be made on the requisite "form and be accompanied by a fee of £1 1s. 0d. An arbitrator "so appointed by the Appointments Committee shall act in the "reference as if he had been appointed by consent."

Rule 63: "The arbitrators or the umpire may require the "parties to formulate their claims and defences respectively in "such manner as they or he may think fit."

Rule 76—which is in the fasciculus of rules dealing with quality or condition arbitration: "All disputes concerning quality "or condition of goods referred to arbitration in accordance with "these rules shall be subject to the rules of the Association in "general and to the following rules in particular, provided always "that where on any point there is any inconsistency then the "following rules shall prevail."

Rule 77: "The party desiring to arbitrate shall so inform "his broker and shall give precise details of his claim for arbitration. The broker, after satisfying himself that the dispute "concerns only quality or condition, shall with due dispatch "notify the other party to the contract of such desire and shall "ascertain from his seller or buyer (as the case may be) whether "or no the dispute relates to a 'string' contract," and the rule then goes on to deal with the method of appointing arbitrators.

Rule 80: "The arbitration shall be conducted solely on the "question of quality or condition of goods and if it be found "that the sample or samples have not been drawn in conformity "with contract requirements, or that the particulars of the goods "or sample(s) do not agree with those stated on the contract "and/or invoice and/or declaration and/or tender and/or specification, or should matters arise other than those concerning

" quality or condition, the arbitrator, arbitrators or umpire (as " the case may be) shall forthwith return the appointment to the " broker and shall not proceed in the arbitration unless and " until they are re-appointed to act."

It is common ground that all the procedural requirements of rule 77 in the first quality arbitration and all the procedural requirements of rule 62 in the second arbitration were followed. It is also clear that the arbitrators in the second arbitration had before them the letters in which the defendants were asserting in substance that the submission to arbitration was exhausted after the first quality award was made, and that as between themselves and the plaintiffs all disputes were concluded and were, as they expressed it, " res judicata." Neither party was legally represented at either arbitration.

Mr. Roche, for the plaintiffs, put his case as follows: he submitted that the plea of res judicata was based on the doctrine of estoppel. He contended that the plaintiffs had a separate cause of action at each arbitration, although both causes of action arose out of the same contract. In the quality arbitration their cause of action arose from the failure of the defendants to fulfil their promise or warranty as to the quality and condition of the goods, and in the second arbitration their cause of action arose from the defendants' failure to fulfil the promise or implied condition that the goods would answer the contractual description. The only dispute between the parties at the time of the first arbitration being as to quality, that was the only dispute which could then be submitted to arbitration, and be adjudicated upon by the arbitrators. Subsequently, so Mr. Roche argued, another cause of action, dependent upon a different promise not relating to quality, arose. Once again, that was a dispute between the parties which, under the rules, fell to be determined by arbitration differing procedurally from the first quality arbitration.

Mr. Roche's second point was as follows: he pointed out that the doctrine of res judicata was a shield, a defence which was open to the defendants at the second arbitration. Although the defendants chose not to appoint an arbitrator or to take any part in the proceedings, the fact that that was their contention was brought to the attention of the arbitrators who, none the less, made an award in favour of the plaintiffs without even appointing an umpire. In those circumstances, Mr. Roche contended that the award so made was conclusive against the defendants. It is, perhaps, worth noting that the concluding sentence of rule 62, which governed the procedure in the second arbitration, is: "An arbitrator so appointed by the Appointment "Committee shall act in the reference as if he had been appointed "by consent."

Mr. Roche submitted that the defendants should, if they wished to take what was essentially a point of law, have taken steps to see that the arbitrators in the second arbitration stated their award in the form of a special case for the opinion of the court. Having failed to take that course and allowed a final award to be made against them the matter was, he submitted, concluded. The parties, argued Mr. Roche, agreed to refer "any "dispute arising out of the contract" to arbitration, and agreed by rule 49 "to be bound by and observe the award" subject, of course, to their right to ask for a special case or to move to set the award aside. He submitted that the words "any dispute "arising out of the contract" included all disputes except a dispute whether the parties had ever been in contractual relationship. For that proposition he cited the well-known case of *Heyman* v. *Darwins Ld.*[1]

On behalf of the defendants, Mr. Duveen submitted that, on the facts of this case, the plaintiffs never had more than one cause of action. This was a contract for the sale of goods, and the only matters which were ever in dispute concerned the issue whether the defendants had delivered goods of the contract quality and description. He relied strongly on *Conquer* v. *Boot.*[2] That was a case in which the plaintiff brought an action in the county court for breach by the defendant, who was a builder, of his contract to complete a bungalow in a good and workmanlike manner, setting out certain particulars of his claim. He duly succeeded and recovered a sum which was within the county court jurisdiction in respect of his first claim. He then brought another action in the county court claiming in identical terms in respect of the builder's breach of contract for a different amount, and alleging that, in addition to having failed to complete the bungalow in a good and workmanlike manner, the defendant had failed to build it with proper materials, and then he gave further particulars which were of the same character as the particulars given in the first action, but related to different complaints which he had in regard to the building of the bungalow. The matter came before the Divisional Court, and it was there held that the cause of action was the same in both actions, namely, breach of contract, and that the question having been decided in the first action, the matter was res judicata and the plaintiff could not recover further damages.

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[1] [1942] A.C. 356; 58 T.L.R. 169; [1942] 1 All E.R. 337.

[2] [1928] 2 K.B. 336; 44 T.L.R. 486.

Talbot J., in his judgment, said [3]: " The rule of law on which " the defendant relies is thus stated by Bowen L.J. in *Brunsden* " v. *Humphrey* [4]: ' It is a well settled rule of law that damages " ' resulting from one and the same cause of action must be " ' assessed and recovered once for all,' and by Lord Halsbury in " *Darley Main Colliery Co.* v. *Mitchell* [5]: ' No one will think of " ' disputing the proposition that for one cause of action you must " ' recover all damages incident to it by law once and for ever ': " see the form of plea in Bullen and Leake, 3rd ed., p. 624. The " defendant contends that there is here but one cause of action— " namely, that the defendant having promised properly to complete a bungalow for the plaintiff for a sum of money to be paid " on completion, has failed to do what he promised, and that the " particulars subjoined in the two actions are merely details of " the manner in which he has failed to perform the one contract, " and of the damages payable for his breach of it. The plaintiff " on the other hand says that the first action was brought for " the various breaches of contract specified in the particulars, " that each of them is a separate breach of a separate contract " and a separate cause of action, and that therefore the former " judgment is no answer to the present action. It appears to " me that as to this the defendant is right and that the cause " of action sued on in the second action is the same as that sued " on in the first. It is the same in point of form. The form is " substantially that in Bullen and Leake, 3rd ed., p. 271, and " the precedents there referred to. It is the same also in sub- " stance. The contract is an entire contract. No claim for " payment could have been made by the defendant unless and " until he had finished the bungalow. There is one contract and " one promise to be performed at one time, although no doubt " the defendant may have failed to perform it in one or in many " respects. There may of course be many promises in one " contract, the breach of each of which is a separate cause of " action."

Then Talbot J. went on [6]: " Here there is but one promise, " to complete the bungalow; and the question whether or not it " has been performed is to be decided by the state in which

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[3] [1928] 2 K.B. 336, 343.

[4] 14 Q.B.D. 141, 147.

[5] (1886) 11 App.Cas. 127, 132; 2 T.L.R. 301.

[6] [1928] 2 K.B. 336, 344.

"the bungalow was when it was handed over by the defendant "to the plaintiff as complete. From that moment the Statute "of Limitations began to run as to the whole. The plaintiff "could not alter the fact that he was recovering damages for "the breach of this single promise by failing to specify in his "action all the particulars of the breach and all the damages to "which he was entitled. The test whether a previous action is "a bar is not whether the damages sought to be recovered are "different, but whether the cause of action is the same. . . ."

Then he said this [7]: "No more can he"—that is, the plaintiff —"recover in one action for breach of a single promise in ten "respects and in another for breach in ten other respects of the "same promise. The giving of such particulars as are necessary "to enable the defendant to know what case he has to meet is "merely incidental to the bringing of the action, and a plaintiff "cannot give himself a right to bring an action which otherwise "he could not bring by failing to specify all the matters which "go to make up his one cause of action, or to claim all the relief "to which he is entitled in respect of it."

No doubt it is possible that a party may have more than one cause of action based on separate breaches by the other party of the same contract, an instance of this would be where successive breaches had taken place of a contract performed by instalments. Other instances can be thought of. Mr. Roche's submission that the breach of every promise express or implied in a contract gives rise to a different cause of action seems to me, however, to be putting the matter too high and to receive no support from the passages which I have just quoted from the judgment in *Conquer* v. *Boot*.[8] Having given the matter careful consideration, I am quite unable to distinguish the present case upon its facts from *Conquer* v. *Boot*.[8] There the cause of action in each proceeding was based on the defendant's failure to build and hand over to the plaintiff a bungalow constructed in a good and workmanlike manner. Here the plaintiffs' cause of action was in respect of the defendants' failure to make delivery of goods of the quality and description provided for by the contract.

I accordingly decide against the plaintiffs on the first point argued by Mr. Roche. This leaves for consideration the point whether any distinction can properly be drawn between the rule applicable to actions, as stated in *Conquer* v. *Boot*,[8] and the situation which has arisen in the present case.

[7] [1928] 2 K.B. 345.

[8] [1928] 2 K.B. 336.

The parties here have agreed to submit their disputes to arbitration under an elaborate set of rules, which, however, were well understood by the commercial people concerned. The only dispute of which the parties were aware at the time of the first arbitration was a dispute as to quality. In this connexion I draw attention to the words of rule 77: "The broker, after "satisfying himself that the dispute concerns only quality or "condition, shall" etc. I also draw attention to rule 80. It is clear that the rules are framed in this fashion in order that the procedure to be followed in quality or condition arbitrations shall be limited to cases in which quality or condition only are in dispute. If the dispute concerns quality or condition and any other dispute as well, for example, as to weight or sufficiency of documents, the general conditions govern procedure unless some special direction is given under rule 80.

The effect of Mr. Duveen's argument on this point leads to the result that under the arbitration clause commonly incorporated in this well-known standard form of contract parties, who go to arbitration over some trifling difference of view as to quality, can wash their hands of the whole matter and defeat, as in this case, a serious claim based on what seems to have been a fundamental misdescription of the goods. It now seems clear that the goods delivered to the plaintiffs were not China Star aniseed, but were aniseed "religiosum" and as such worthless. It was not suggested in argument before me that either party or the arbitrators at the first quality arbitration had been guilty of any negligence or lack of care in not discovering this fact until it was pointed out to the plaintiffs by their buyer. I assume that the defendants were morally innocent in the matter and that it was their sellers or, more probably, the original suppliers who first misdescribed this toxic product as China Star aniseed.

Proceeding, as I do, on the assumption that it is impossible to distinguish this case upon its facts from *Conquer* v. *Boot*,[8] by which I am, of course, bound, I have to consider Mr. Roche's second submission, which I have already outlined. Here the parties have agreed to submit all disputes arising out of this contract of sale to arbitration. They have chosen their tribunal for better or for worse. They have also agreed to be bound procedurally in regard to the arbitration of any disputes arising by the appropriate rules of the association dealing with arbitrations. At the time of the first quality arbitration there was only one dispute between the parties, namely, as to the quality of the goods. A quality arbitration was accordingly held and the arbitrators dealt with the only matter submitted to them upon which there was any dispute, namely quality. That was, moreover, the only matter with which the arbitrators at that quality arbitration were competent under the rules to deal. Subsequently a second dispute arose on description. Whether or not technically arising out of the same cause of action, there was clearly a dispute arising out of the contract of sale, and consequently a matter which the parties had agreed to submit to arbitration.

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[8] [1928] 2 K.B. 336.

For such a dispute the rules of the association provide a different procedure. In each case, however, what is in question is a dispute arising out of the contract of sale, and the question which I have to consider is whether, when parties have agreed to submit any disputes arising out of a single cause of action to arbitration, the rule in *Conquer* v. *Boot* [8] applies; that is to say, they must submit all such disputes to one tribunal at one time. It is well known that quality arbitrations, whilst conducted by highly experienced business men, are often extremely informal affairs, and rule 80 of the rules of the association makes it clear that if any dispute which does not relate to quality or condition arises at a quality arbitration, the arbitrators are to return their appointments. What occurs then is not made clear by the rule, nor was I informed as to the subsequent procedure in such a case. It may be that separate panels are appointed to deal with the quality dispute and any other dispute which does not concern quality or condition, or it may be that all disputes are then referred to a panel constituted under rule 62. I cannot help feeling, however, that the business community who use the association's rules would be somewhat surprised if they were told that in a case such as this the holding of a quality arbitration exhausted their right to submit to arbitration any new dispute which might arise. Whether this was or was not the intention of those responsible for drafting the association's rules when they provided for two different types of arbitrations dealing in watertight compartments with "condition and quality" disputes and other disputes is, however, immaterial. I have to take the rules as I find them. In principle there appears to me to be a possible distinction, which may be important on this point, between a judgment and the award of an arbitrator. In note (a) at p. 624 of Bullen and Leake, 3rd ed., it is said: " A judgment " recovered by the plaintiff in an action merges the original cause " of action in the higher security, and affords a good defence to " a second action for the same cause."

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[8] [1928] 2 K.B. 336.

Where arbitration is in question, the parties agree to submit all their disputes to arbitration, and it is clear that many disputes may arise out of the same cause of action. Whether or not it is proper to regard an award as the same type of higher security as a judgment of the court and as operating as a merger of all the rights of the claimant arising out of the same cause of action may be doubtful. I am inclined, however, to think that, in spite of any technical differences which may exist in this connexion between judgments and awards, it might be difficult to argue successfully that, in so far as the point with which I am dealing is concerned, any valid distinction can properly be drawn between them.

For the purpose of this judgment I am prepared to assume that if the defendants had taken steps to have the award in the second arbitration stated in the form of a special case raising the point which they now put forward, they might well have been held entitled to succeed under the decision in *Conquer* v. *Boot*.[8]

I propose, however, to decide this case on broader grounds, which I can state shortly. The parties have agreed to submit all their disputes to arbitration. The words " any dispute arising " out of the contract . . ." cover every dispute except a dispute whether there was ever a contract at all, because if there was no contract, there was no arbitration clause. In this connexion I would quote a passage from the speech of Viscount Simon L.C. in *Heyman* v. *Darwins Ld.*[9]: " If the dispute is whether the " contract which contains the clause has ever been entered into " at all, that issue cannot go to arbitration under the clause, for " the party who denies that he has ever entered into the contract " is thereby denying that he has ever joined in the submission. " Similarly, if one party to the alleged contract is contending " that it is void ab initio (because, for example, the making of " such a contract is illegal), the arbitration clause cannot operate, " for on this view the clause itself also is void. But, in a " situation where the parties are at one in asserting that they " entered into a binding contract, but a difference has arisen " between them whether there has been a breach by one side " or the other, or whether circumstances have arisen which have

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[8] [1928] 2 K.B. 336.

[9] [1942] A.C. 356, 366.

"discharged one or both parties from further performance, such "differences should be regarded as differences which have arisen "'in respect of,' or 'with regard to,' or 'under' the contract, "and an arbitration clause which uses these, or similar, "expressions should be construed accordingly."

In the present case there was clearly a second dispute, and an important one, arising out of the contract between the parties. Having agreed to submit any dispute to arbitration the parties were, in my view, bound to submit this dispute to arbitration. The defendants made it clear that they were contending that the contractual provisions for arbitration in the event of dispute had been exhausted by the first submission and award. Whether they were right or not, there was clearly a point of law which might not be easy for lay arbitrators to determine. Subject to their right to require the arbitrators or umpire to state their award in the form of a special case, they had agreed to be bound by and observe the award of the arbitrators or umpire (see rule 49 (a)). The arbitrators in the second arbitration had, therefore, to consider a question of fact, namely, whether the goods had been misdescribed, and a question of law, namely, whether they had any jurisdiction to entertain the plaintiffs' claim. The question of law was clearly raised on the correspondence which was before them. They decided both points in favour of the plaintiffs. The defendants had an opportunity of ensuring that the point of law which they were raising should be considered by the court. They failed to take that opportunity and now find themselves faced with a final award which cannot be impugned on any of the ordinary grounds. Having allowed the matter to proceed in this way, the award of the arbitrators in the second arbitration is, in my view, conclusive against them.

There must, therefore, be judgment for the plaintiffs for the sum claimed, with costs.

Judgment for the plaintiffs.

Solicitors: *Thomas Cooper & Co.; Fink, Proudfoot & Waters.*

BROWN *v.* DREW.

1953
July 15.

Lord Goddard C.J., Parker and Donovan JJ.

Licensing—Hotel—Restricted licence—Whether occasional licence also may be granted—Licensing (Consolidation) Act, 1910 (10 *Edw.* 7 *&* 1 *Geo.* 5, *c.* 24), *s.* 64 (1), (3).

Justices granted an occasional licence for the sale of intoxicating liquor to take effect at an hotel which was already licensed for the sale of liquor on the premises to residents and to non-residents for consumption with meals:—

Held, dismissing an appeal by the police against the grant of the licence, that there was nothing in section 64 (3) of the Licensing (Consolidation) Act, 1910, to preclude the grant of an occasional licence in respect of premises which were already licensed. Where an occasional licence is granted to unlicensed premises the statutory fiction that those premises "shall be deemed to be licensed" operates, but it is not necessary to invoke the fiction where premises are already licensed.

CASE STATED by Cornwall justices, sitting at Liskeard.

On February 11, 1953, the respondent, Kenneth Bailey Drew, applied under section 64 of the Licensing (Consolidation) Act, 1910,[1] for an occasional licence to sell intoxicating liquor at the Hannafore Point Hotel between the hours of 8 p.m. and 11 p.m. on February 14, 1953, on the occasion of a Valentine Night Ball. The appellant, Chief Inspector George Brown, of the Cornwall Constabulary, opposed the application.

On the hearing of the application the following facts were proved or admitted before the justices: (1) That the respondent held a justices' licence in respect of licensed premises known as the Looe Hotel authorizing him to sell intoxicating liquor on or off the premises; (2) that one Ronald Charles Roberts held a

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[Reported by Mrs. E. M. WELLWOOD, Barrister-at-Law.]

[1] Licensing (Consolidation) Act, 1910, s. 64: "(1) An occasional licence "shall not be granted except with the "consent of a petty sessional court, "and unless twenty-four hours at "least before applying for that con-"sent the applicant has served on the "superintendent of police for the dis-"trict notice of his intention to apply "for the consent, setting out his name "and address, the place and occasion "in respect of which the licence is "required, the period for which the "licence is to be in force, and the "hours to be specified in the consent "of the justices.

"(3) For the purpose of the provi-"sions of this Act . . . and for the "purpose of section 12 of the Licens-"ing Act, 1872, and any provisions "for giving effect to those sections, "a person taking out an occasional "licence shall be deemed to be the "holder of a justices' licence, and "the place in which any intoxicating "liquor is sold in pursuance of the "occasional licence shall be deemed "to be licensed premises, and to be "the premises of the person taking "out the occasional licence."

justices' licence in respect of licensed premises known as the Hannafore Point Hotel authorizing him to sell intoxicating liquor for consumption on the premises (a) to hotel residents, and (b) to non-residents for consumption with a meal.

It was contended for the police that the court had no power to grant the licence; that under section 64 (3) of the Act premises in respect of which an occasional licence was granted were deemed to be licensed premises; that premises which were deemed to be licensed could not be actual licensed premises; and that therefore no occasional licence could be granted in respect of premises already licensed.

It was contended for the respondent that the word " deemed," which appeared twice in section 64 (3), must bear the same meaning in each context; that as the subsection provided that " a person taking out an occasional licence shall be deemed to " be the holder of a justices' licence " the word " deemed " could not bear the meaning assigned to it by the police, since only a person who was already the holder of a retailer's on-licence could apply for an occasional licence.

The justices, being of the opinion that they had power to grant the licence, and that it was advisable to do so, granted the licence applied for.

The police appealed.

G. R. King Anningson for the appellant. Section 64 of the Act of 1910 is designed to cover an application in respect of premises which are not already licensed. The premises in respect of which this application was made were already licensed under a limited licence, and therefore the proper procedure was for the holder of the limited licence to obtain an exemption from the limitation under section 57: see Patterson's Licensing Acts, 60th ed., pp. 635–6. The grant of an occasional licence does not supersede a limited licence, and therefore the grant of the occasional licence to Mr. Drew means that there are two licences held by different persons in respect of the same premises.

[Lord Goddard C.J. Is it not a matter for the justices' discretion?]

No. It is submitted that one cannot have two similar licences running together: *Rex* v. *Taylor*, *Rex* v. *Amendt.*[2] [*Groh* v. *Hesketh*[3] was also referred to.] By section 64 (3) premises in respect of which an occasional licence is granted are "deemed "to be licensed premises." Premises cannot be deemed to be licensed if they are in fact already licensed. That would be a contradiction in terms. "Licensed premises" are defined in section 110 as "premises in respect of which a justices' licence "has been granted and is in force." If premises are licensed under a limited licence and also under an occasional licence then they are licensed twice.

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[2] [1915] 2 K.B. 593; sub nom. *Rex* v. *Taylor* (*ex p. Attorney-General*), *Rex* v. *Amendt* (*ex p. Attorney-General*) 31 T.L.R. 317.

[3] [1908] 1 K.B. 654; 24 T.L.R. 269.

The respondent did not appear and was not represented.

LORD GODDARD C.J. This case raises a rather curious point under section 64 of the Licensing (Consolidation) Act, 1910, which does not appear to have arisen before. The respondent, Drew, the licensee of the Looe Hotel at Looe, has an unrestricted and full licence. One Roberts is the licensee of the Hannafore Point Hotel at Looe, and his licence is subject to the conditions that liquor can only be sold to a person residing in the hotel or to a person, if he is not a resident, at the same time as a meal for consumption with the meal; in other words, there is to be no bar. Roberts was arranging for a ball to be held at the Hannafore Point Hotel in February and, curiously enough, he did not apply for an exemption, although apparently he could have done so; perhaps it was because he thought that the local authority would not grant one. He asked Drew to apply for an occasional licence to enable Drew to sell liquor at his (Roberts') hotel. That is an unusual thing to do—and the police may have certain objections to it—but the question before the court is whether the justices who granted the licence had power to grant it. If they had the power, then it was for them to say whether in their discretion they would do so. I can well understand that many benches of justices would think that it was not a case in which they would exercise their discretion even though they had a discretion.

[His Lordship read section 64 (1) of the Licensing (Consolidation) Act, 1910, and continued:] Those facts must be set out in order that the justices can decide whether they will give their consent or not, and if they do give consent, they can limit the licence in point of place and time—they can stipulate that liquor is not to be supplied after eleven or twelve o'clock, or whatever time they think reasonable. [His Lordship read subsection (3).] Curiously enough, as Mr. Anningson pointed out, although this subsection says that a person taking out an occasional licence shall be deemed to be the holder of a licence, it is only a person who holds a licence already who will be granted an occasional licence. Mr. Anningson's argument is that as the section states that "the place in which any intoxicating liquor is sold in pursuance of "the occasional licence shall be deemed to be licensed premises," that prohibits the grant of a licence to premises which are already licensed. Speaking for myself, I am afraid that I am unable to give effect to that argument. It is obvious that those words were put in for this purpose, that the statutory fiction as to licensed premises is intended to and must apply where the premises are not licensed premises. If they are not licensed at all, then they are deemed to be licensed immediately an occasional licence is given in respect of them. The common case is the refreshment marquee at an agricultural or flower show. When those places are subject to an occasional licence they are deemed to be licensed premises, but I do not think that that means that premises which are already licensed cannot have an occasional licence. I cannot find anything in the section which states that an occasional licence cannot be granted in respect of premises which are already licensed. It would have been open to the justices in this case to have said, had they seen fit, that the occasional licence was to apply only to the ballroom or to some other place in the hotel, and to have set down what was to be the subject of the occasional licence. I can quite well see that there are objections which can be urged before justices against their taking this course, but this court has only to decide whether or not the justices have power to do that which they did. If they have power, the question whether this court would have approved of it or not if we had been justices, does not arise. For these reasons the appeal must be dismissed.

Parker J. I agree.

Donovan J. I agree. Where any premises are unlicensed, the statutory fiction introduced by section 64 (3) operates, but it is not necessary to invoke the fiction where premises are already licensed.

Appeal dismissed.

Solicitors: *Jaques & Co., for Stephens & Scown, St. Austell.*

OAKLAND METAL CO. LD. *v.* D. BENAIM & CO. LD.

1953
July 2.

Parker J.

Arbitration—Qualification of arbitrator—Arbitration to be held under rules of one of two trade associations—One arbitrator not qualified to act under the rules adopted—Award—Validity—Whether party entitled to set up non-qualification of his own arbitrator to invalidate award—Estoppel by conduct.

A contract provided that any dispute arising between the parties should be settled by arbitration "according to the rules of the "London Metal Exchange or the National Association of Non-"ferrous Scrap Metal Merchants." A dispute having arisen between the parties, the plaintiffs expressed a preference for an arbitration under the rules of the London Metal Exchange. The defendants appointed an arbitrator qualified to act under the rules of the National Association, and suggested to the plaintiffs that the arbitration should take place under those rules. The plaintiffs appointed an arbitrator qualified to act under the rules of the London Metal Exchange but not under the rules of the National Association, but in their letter to the defendants naming their arbitrator they made no reference to the rules under which the arbitration was to be conducted, nor did they inform the defendants that their arbitrator was not qualified to act under the rules of the National Association, under which rules the arbitration subsequently took place. An award was made in favour of the defendants, and thereupon the plaintiffs sought a declaration that the award was a nullity, contending, inter alia, that as the arbitrator appointed by them was not qualified to act under the rules of the National Association there was no jurisdiction to make the award:—

Held, that the plaintiffs had put forward their arbitrator under circumstances in which any reasonable person would accept him as qualified to act under the rules of the National Association of Non-ferrous Scrap Metal Merchants, and thereafter, by proceeding with the arbitration, had represented to the defendants that he was so qualified, and they could not thereafter be heard to say that he had not the necessary qualifications. Where a person puts forward an arbitrator, representing to the other side that the arbitrator is qualified to act on his behalf and the matter proceeds to award, he is estopped from setting up the non-qualification of his arbitrator in order to invalidate the award.

Dictum of Pickford J. in *Jungheim, Hopkins & Co.* v. *Foukelmann* [1909] 2 K.B. 948, 957; sub nom. *Jungheim, Hopkins & Co.* v. *Fonkelmann,* 25 T.L.R. 819, applied.

ACTION.

The plaintiffs, Oakland Metal Co. Ld., metal alloy manufacturers and refiners, carrying on business in England, entered

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[Reported by Mrs. E. M. WELLWOOD, Barrister-at-Law.]

into a written contract with D. Benaim & Co., a partnership, carrying on business in Gibraltar, under which they agreed to buy a quantity of zinc ingots at £280 per metric ton c.i.f. Rotterdam. The contract included an arbitration clause providing that " any dispute arising under this contract to be settled by " arbitration in accordance with the rules and regulations of the " London Metal Exchange or the National Association of Non-" ferrous Scrap Metal Merchants." A dispute arose, and by letter dated June 10, 1952, the partnership proposed that it should be referred to arbitration. The plaintiffs at first refused, but on November 26, 1952, they wrote to the partnership agreeing to arbitration " according to the rules of the London Metal " Exchange."

Meanwhile, the business of the partnership had been taken over by the defendants, a limited company formed for that purpose. The defendants informed the plaintiffs that they had taken over the partnership business, and subsequent correspondence with regard to the dispute took place between the plaintiffs and the defendants. In a letter to the plaintiffs dated December 3, 1952, the defendants referred to the plaintiffs' suggestion that the dispute under the contract should be settled according to the rules of the London Metal Exchange and asked for a copy of its rules. On receiving them, they wrote again to the plaintiffs, pointing out there was substantially no difference between the rules of that body and the National Association of Non-ferrous Scrap Metal Merchants; stating that they had already appointed a Mr. Leopold Lazarus, an arbitrator qualified to act under the latter rules, and suggesting that the plaintiffs should choose an arbitrator from the panel of the National Association and that the arbitration should proceed under those rules. By a letter dated December 24, 1952, the plaintiffs named a Mr. Rudolph Brenner as their arbitrator, but they made no reference to his qualifications, nor did they refer to the rules under which the arbitration was to be conducted. The arbitration proceeded under the rules of the National Association, and on February 16, 1953, an award was made in favour of the defendants.

Mr. Brenner was not, in fact, qualified to act under the rules of the National Association, but he was qualified to act under the rules of the London Metal Exchange.

In an action for a declaration that the award was a nullity the plaintiffs contended: (1) that the parties were not ad idem and that there was therefore no agreement to go to arbitration under the rules by which the arbitration was conducted; (2) that the dispute was with the partnership with whom the contract had been made and not with the defendants, the limited company; (3) that Mr. Brenner being unqualified to act under the rules of the National Association there was no jurisdiction to make the award; and (4) that the award was out of time.

The defendants contended: (1) that the plaintiffs were estopped from denying that there was an agreement; (2) that the plaintiffs had accepted the defendants as parties to the contract in substitution for the partnership; (3) that the plaintiffs were estopped from denying the qualification of their own arbitrator; and (4) that the court had a discretion under section 13 (2) of the Arbitration Act, 1950, to extend the time for the making of the award.

On the first two points, which do not call for report, his Lordship found that the defendants were entitled to assume that there was an agreement which the plaintiffs, by their conduct, were precluded from denying; and that there had been a novation of the contract whereby the defendants became substituted for the partnership.

[The case is reported only on the third point.]

J. F. Donaldson for the plaintiffs. As one of the arbitrators was not qualified to act, the arbitrators had no jurisdiction to determine the dispute: *Jungheim, Hopkins & Co.* v. *Foukelmann.*[1] Merely continuing with an arbitration knowing one of the arbitrators to be unqualified is not sufficient to constitute a waiver. While in *Jungheim, Hopkins & Co.* v. *Foukelmann* Pickford J. observed [2] that a party to an arbitration may well be estopped from setting up the disqualification of his own arbitrator, it is submitted that that does not operate in this case. It is for the defendants here to prove that the plaintiffs are estopped from setting up Mr. Brenner's disqualification, and if they cannot prove estoppel then the plaintiffs are entitled to repudiate the arbitration.

J. P. Widgery for the defendants. It is not contended that Mr. Brenner was qualified to act under the rules of the National Association for Non-ferrous Scrap Metal Merchants. The defendants were under no obligation to verify the qualifications of the arbitrator appointed by the plaintiffs, and if they had no duty so to do the fact that they did not do so is immaterial. It is clear from *Jungheim, Hopkins & Co.* v. *Foukelmann* [3] that the plaintiffs would have been entitled to rely on some defect in the qualification of the defendants' arbitrator, but it is not open to them, through their own failure to appoint an arbitrator duly qualified to act, to set up that disqualification so as to contend that the arbitration is a nullity; by their conduct they have put themselves in the position of agreeing that the rules of the National Association of Non-ferrous Scrap Metal Merchants should apply, and they must abide by those rules.

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[1] [1909] 2 K.B. 948; 25 T.L.R. 819.

[2] [1909] 2 K.B. 948, 957.

J. F. Donaldson, in reply. The facts in this case are very different from those in *Jungheim, Hopkins & Co.* v. *Foukelmann.*[3] In that case the parties were ad idem, while here the plaintiffs are submitting that they were not. Pickford J.'s remarks were obiter as applied to the circumstances of this case.

[PARKER J. Pickford J. was alluding to facts which cover this case.]

The matter goes to jurisdiction, and the courts are slow to say that a person acquires jurisdiction merely by exercising it.

[PARKER J. [having stated the facts and dealt with the first two issues] continued: The third point is, to my mind, the most interesting point in the case. Mr. Brenner was not qualified to act under the rules of the National Association of Non-ferrous Scrap Metal Merchants, though he was qualified to act under the London Metal Exchange Rules. The plaintiffs contend that as he was not in fact qualified he and his co-arbitrator Mr. Lazarus (who was qualified) had no jurisdiction to make this award and accordingly that it is a nullity. This is a matter which goes to jurisdiction, and is one which the courts will scrutinize very closely; but if a person puts forward an arbitrator and tells the other side, in effect: "Here is a man whom we appoint who "is qualified to act on our behalf," and the matter proceeds to award, I do not see why, as a matter of principle, that person is not estopped from setting up the non-qualification of his arbitrator.

The matter, apparently, is devoid of authority, except for dicta in *Jungheim, Hopkins & Co.* v. *Foukelmann,*[1] a decision of Pickford J. In that case neither of the arbitrators concerned had the necessary qualifications. They had to be principals engaged in the corn trade in one capacity or another, and had also to be members of either the London Corn Exchange, the Baltic, or the London Corn Trade Association, and they failed in those qualifications. The plaintiffs in that action succeeded before Pickford J. in obtaining a declaration that the award was null and void because there was no jurisdiction, and they did that despite the fact that the plaintiffs claimed that they were entitled to succeed on the basis of estoppel. Pickford J., with regard to this point, said [2]: "Inasmuch as the plaintiffs had no "knowledge of the want of qualification of the arbitrators there "has been no waiver here." That is dealing with waiver. He then went on to consider estoppel: "With regard to estoppel, it "is said that by going on with the arbitration the plaintiffs "represented that the qualification of the arbitrators was in "order, and that their appointment was valid and the proceedings "regular, and that they thereby induced the defendant to go on "with the arbitration and to incur expense. I think that, so far "as their own appointed arbitrator is concerned, that may well "be so. If they choose, without proper inquiry, to appoint a "person as arbitrator who has not the proper qualification, "thereby putting him forward as properly qualified, and attend "the proceedings before him, and thus induce the other party to "go on, most probably they cannot afterwards be heard to say "that the arbitration is invalid as being before an unqualified "arbitrator." He then continued: "But I do not see how that "reasoning can apply to the qualification of the arbitrator "appointed by the other party."

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[3] [1909] 2 K.B. 948.

[1] [1909] 2 K.B. 948; 25 T.L.R. 819.

It is true that those remarks were unnecessary for the decision in that case, but I have no hesitation in adopting them, and I entirely agree with Pickford J.'s reasoning. In this case the plaintiffs put forward Mr. Brenner's name under circumstances in which any reasonable person would accept him as an arbitrator qualified to act under the National Association of Non-ferrous Scrap Metal Merchants' rules, and the plaintiffs thereafter, by proceeding with the arbitration and by sending forward their case, were representing and continuing to represent that Mr. Brenner was so qualified. In those circumstances they cannot thereafter be heard to say that he did not have the necessary qualification.

That disposes of this case subject to the last point taken, namely, that the award is out of time because under rule 7 of these rules the award must be made and delivered to the secretary of the

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[2] [1909] 2 K.B. 948, 957.

1953

OAKLAND METAL CO. LD. *v.* D. BENAIM & CO. LD.

Parker J.

association within a period of 30 days from the date of the appointment of the arbitrator last appointed. The date so calculated would have been a date early in February, 1953, whereas this award was not made until February 16, 1953. In answer to that, Mr. Widgery, for the defendants, invites me, under section 13 (2) of the Arbitration Act, 1950, to extend the time for the making of the award. Under that section the court has a very wide discretion to enlarge the time after it has expired. It seems to me that this is a proper case in which to do so, subject to this, that the court hesitates to do so if the application is made at a late date. In the circumstances of this case, however, it seems to me that it was perfectly reasonable for the defendants, rather than to take out an application at once for an enlargement of time to wait and apply to the trial judge. If there had been an application to the master in the first instance to enlarge the time I imagine that he would in any event, in the circumstances of a case such as this, have referred it to the trial judge. Accordingly, under section 13 (2) of the Act, I would enlarge the time for making the award by one month.

In these circumstances this claim fails and there must be judgment for the defendants.

Judgment for defendants.

Solicitors: *Thomas Cooper & Co.; William A. Crump & Son.*

1953
July 17.

Lord Goddard C.J., Parker and Donovan JJ.

FISHER *v.* YARDLEY'S LONDON AND PROVINCIAL STORES LD.

SAME *v.* SANTOVIN LD.

Food and Drugs—Sale of article to prejudice of purchaser—Proceedings against retailer—Contemporaneous proceedings against supplier—Admission that retailer had good defence—Food and Drugs Act, 1938 (1 *&* 2 *Geo.* 6, *c.* 56), *s.* 83 (3).

Where an offence has been committed under the Food and Drugs Act, 1938, by one person and the authority concerned, being reasonably satisfied that the offence was due to an act or default by some other person, causes proceedings to be taken under section 83 (3) against that other person, he cannot contemporaneously continue proceedings against the first person.

CASES STATED by a metropolitan magistrate sitting at Clerkenwell.

[Reported by Miss C. J. ELLIS, Barrister-at-Law.]

1953

FISHER
v.
YARDLEY'S
LONDON AND
PROVINCIAL
STORES LD.

The prosecutor, Stanley George Fisher, a sanitary inspector for the metropolitan borough of Holborn, preferred informations against Yardley's London and Provincial Stores Ld. and Santovin Ld. under section 3 of the Food and Drugs Act, 1938.

On the hearing of a preliminary objection the following facts were proved or admitted: On December 11, 1952, the inspector laid an information against Yardley's London and Provincial Stores Ld. charging them with selling, on September 29, 1952, to the prejudice of the purchaser, instead of the bottle of sherry demanded by him, a bottle containing 99·96 per cent. of water. On December 22, 1952, Yardley's sent to the inspector a copy of a warranty given by Santovin Ld. in respect of the supply of the bottle of sherry together with a notice which complied with section 84 of the Act of 1938. On January 6, 1953, the inspector laid an information against Santovin Ld. charging them with the same offence and stating: "And the council of the Metro-"politan Borough of Holborn being the Food and Drugs authority "concerned are reasonably satisfied that the said offence was "due to the act or default of your Santovin Ld. and that the "said Yardley's London and Provincial Stores Ld. could "establish a defence under section 83 (1) [1] of the Food and Drugs "Act, 1938." Santovin Ld. notified the inspector on January 15,

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[1] S. 83 of the Food and Drugs Act, 1938: "(1) A person against "whom proceedings are brought "under this Act shall, upon informa-"tion duly laid by him and on giving "to the prosecution not less than "three clear days' notice of his in-"tention, be entitled to have any "person to whose act or default he "alleges that the contravention of "the provisions in question was due "brought before the court in the pro-"ceedings, and, if, after the contra-"vention has been proved, the "original defendant proves that the "contravention was due to the act or "default of that other person, that "other person may be convicted of "the offence, and, if the original "defendant further proves that he "has used all due diligence to secure "that the provisions in question were "complied with, he shall be acquitted "of the offence. (2) Where a defen-"dant seeks to avail himself of the "provisions of the preceding subsec-"tion—(*a*) the prosecution, as well as "the person whom the defendant "charges with the offence, shall have "the right to cross-examine him, if "he gives evidence, and any witness "called by him in support of his "pleas, and to call rebutting evi-"dence; (*b*) the court may make such "order as it thinks fit for the pay-"ment of costs by any party to the "proceedings to any other party "thereto. (3) Where it appears to "the authority concerned that an "offence has been committed in "respect of which proceedings might "be taken under this Act against "some person and the authority are "reasonably satisfied that the offence "of which complaint is made was due "to an act or default of some other "person and that the first-mentioned "person could establish a defence "under subsection (1) of this section, "they may cause proceedings to be "taken against that other person "without first causing proceedings to "be taken against the first-mentioned "person."

1953, that they also intended to rely on a warranty under section 84 given by Geo. Jones & Co. (London) Ld. On January 24, 1953, the inspector laid an information against Geo. Jones & Co. (London) Ld. in respect of the same offence stating that the council were reasonably satisfied that Yardley's and Santovin Ld. could establish defences under section 83 (1). The three informations were heard on the same day and were all dismissed.

The magistrate was of the opinion in respect of the informations against Yardley's and Santovin Ld. that, as the inspector had stated in the subsequent informations that he was reasonably satisfied that the offence was due to the act or default of a person other than Yardley's or Santovin Ld., and that they could both establish defences under section 83 (1), he was admitting that he had no case against them and was not entitled to ask the court to convict, and the informations were accordingly dismissed without any evidence thereon being heard.

The prosecutor appealed against the magistrate's decision in respect of the informations against Yardley's and Santovin Ld.

Paul Wrightson for the prosecutor. *British Fermentation Products Ld.* v. *British Italian Trading Co. Ld.*[2] laid down that where proceedings are taken under section 83 (1) of the Food and Drugs Act, 1938, a whole chain of defendants may be brought in. The words "original defendant" in that subsection include any person subsequently brought in. The whole proceedings under section 83 are one. Section 83 (3) entitles the prosecution to take proceedings against the person whom they are "reasonably satisfied" is responsible for the offence. But in being "reasonably satisfied" the prosecution must not usurp the position of the court and judge the issue. The procedure in the present case is correct.

James Burge for Yardley's London and Provincial Stores Ld. Subsection (1) of section 83 is different from subsection (3). This appears to be the first time that the prosecution have sought to bring in a chain of people by making use of subsection (3). The prosecution, knowing that Yardley's would produce a warranty, could have proceeded against the suppliers under section 85, but not under section 83 (3). If Yardley's did not have a warranty, they would have been entitled to bring before the court the person who had supplied them under subsection (1). By their present procedure the prosecution are making a wrong use of the Act of Parliament. Subsection (3) empowers the prosecutor to by-pass the retailer if he is satisfied that he is not responsible and proceed directly against the supplier. It does not mean that both the retailer and his supplier can be brought before the court to fight out the case between themselves.

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[2] [1942] 2 K.B. 145; 58 T.L.R. 255; [1942] 2 All E.R. 256.

J. Hutchinson for Santovin Ld. The result of the prosecution proceeding under subsection (3) is that the third parties have been deprived of their rights under section 83 (2), which entitles them to cross-examine the other parties, and to have an order for costs made in their favour if the court thinks fit. If the three summonses are heard together none of the defendants is entitled to cross-examine the others, because that right only arises where subsection (1) is properly applied. If the case were remitted the defendants would be deprived of the opportunity to avail themselves of their rights under subsections (1) and (2).

Paul Wrightson, in reply. Neither of the respondents gave notice under subsection (1) of their intention to bring in another person; without serving notice neither of them could put up a defence under that subsection.

[LORD GODDARD C.J. I think that this is an improper procedure. You could have gone before the magistrate and withdrawn the summons against Yardley's. You cannot really say that a person has a perfectly good defence and still summons him—no jury would convict.]

It might have been an abuse of process if it had been done without thought, but in the circumstances the summonses were perfectly proper.

LORD GODDARD C.J. referred to the facts and continued: Section 83 of the Act of 1938 was designed very largely to save costs, and also to give a complete defence in some cases where there was not a warranty as referred to in section 84. By section 83 (1), if a shopkeeper has sold goods to a customer, and is summoned for a breach of the Act, he has the right of bringing in as a defendant the person by whom he was supplied with those goods, in other words, his wholesaler. The subsection also provides that unless the shopkeeper shows that he has taken reasonable steps to secure that the provisions of the Act were complied with, he also can be convicted. Where the wholesaler is brought before the court under that subsection, subsection (2) provides that he and the prosecution can cross-examine the shopkeeper and the bench can thus determine where the real truth lies.

[His Lordship read section 83 (3) and continued:] As Donovan J. has pointed out, the fact that that subsection refers to proceedings which "might" be taken seems to indicate such proceedings will not be taken if the subsection is going to be used.

In the present case a summons was issued against Yardley's, who might well have used subsection (1), or they might have availed themselves of the provisions of section 84, relying on a warranty. But before the case against Yardley's came on, a further summons was issued against Santovin Ld. in which it was recited that Yardley's had been charged with selling to the prejudice of the purchaser; that the local authority were reasonably satisfied that the offence was due to the act or default of Santovin Ld. and that Yardley's could establish a defence under section 83 (1). The authority did not go to the magistrate and ask for leave to withdraw the information. Therefore there was the absurd position that there was a summons to be heard against Yardley's, and Santovin Ld. were being prosecuted on the ground that the prosecutors were satisfied that the offence was due to Santovin Ld. and that Yardley's have a good defence.

It seems to the court that subsection (3) is applicable only where no proceedings are taken against the retailer. One cannot have the two proceedings going on at the same time because it is an abuse to ask a court to hear a case in respect of a person as to whom the prosecutor, being a public authority, is reasonably satisfied that he has a good defence. If the proceedings had been taken against Yardley's, and then the local authority had come to the conclusion rightly or wrongly that Santovin Ld. were really the people liable, they might have gone to the court and asked for leave to withdraw the proceedings against Yardley's, and then taken proceedings against Santovin Ld. under subsection (3). But it is clear that proceedings under subsection (3) cannot go on contemporaneously with proceedings against the retailer. The retailer might in this case, three days before the summons was heard, have served notice that he was going to bring in Santovin Ld.; but he cannot be expected to do that when Santovin Ld. have already been brought in by the local authority. We think that these proceedings were wrong, and therefore the magistrate was quite right in saying that these two proceedings which have been left on the file should be dismissed because, as Mr. Hutchinson has properly pointed out, if the proceedings had been taken by Yardley's under subsection (1), subsection (2) gives him certain rights which he has not got under subsection (3). For these reasons, I think that the magistrate came to a right conclusion in point of law and the appeal should be dismissed.

Parker J. I agree.

Donovan J. I agree.

Appeals dismissed.

Solicitors: *C. F. S. Chapple; J. E. Lickfold & Sons; W. T. Ricketts & Son.*

ÉTABLISSEMENT BAUDELOT v. R. S. GRAHAM & CO. LD.

C. A.

1952
Dec. 15, 16.

Singleton, Birkett and Morris L.JJ.

Practice—Parties—French firm—Described in writ as "a company "incorporated according to the laws of France"—Mere misnomer —Firm not a non-existent person—Amendment by adding names of members—R.S.C., Ord. 4, *r.* 1; *Ord.* 16, *r.* 2.

The plaintiffs, suing for goods sold and delivered, were described in the writ as "Établissement Baudelot." The plaintiffs' solicitor at the end of the back of the writ, purporting to comply with R.S.C., Ord. 4, r. 1, by indorsing the address of the plaintiffs and also his own name or firm and his own place of business within the jurisdiction, wrote: "This writ was issued by Messrs. "Keene, Marsland & Co., whose address for service is 52, Mark "Lane, London, E.C.3, solicitors for the said plaintiffs, a company "incorporated according to the laws of France, whose place of "business is situate at Montereau, France." The principals of the Établissement Baudelot were the widow, son and daughter of Monsieur Baudelot, who died in 1937, carrying on the trading concern of the late Monsieur Baudelot with whom the defendants had carried on business since 1949.

At the outset of the trial the defendants contended that the name of the plaintiffs on the writ and all subsequent proceedings should be struck out and the action dismissed on the ground that the plaintiff was a non-existent person being described as a body corporate. The judge found that the plaintiffs were not a company incorporated according to the laws of France and amended the

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writ by adding to the name Établissement Baudelot the names of the three persons who were carrying on this trading concern:—

Held, that the contention of the defendants that the plaintiffs were a non-existent person was erroneous. The defendants had traded with them since 1949. The judge was right in allowing the amendment by virtue of R.S.C., Ord. 16, r. 2, and the statement made by the plaintiffs' solicitor in compliance with R.S.C., Ord. 4, r. 1, that the plaintiffs were a company incorporated according to the laws of France was merely a misnomer.

Decision of Sellers J. affirmed.

Appeal from Sellers J.

The facts as stated in the judgment of Singleton L.J. were as follows. Monsieur Baudelot had a factory and a business in the neighbourhood of Montereau in France. He died in 1937, and thereafter the business was carried on by his widow, his son and his daughter, and was known as Établissement P. Baudelot. According to its notepaper it had large works at Monterau. One of its activities was the manufacture of firebricks, and firebricks were required by the defendant company, R. S. Graham & Co. Ld. of London, so that they could supply them to other people. In March and April, 1950, Établissement Baudelot supplied under contract to the defendant company, or to their order, goods to the value of £20,637 5s. 9d. The defendant company paid over a period £15,306 12s. 5d. On July 18, 1950, it was said that the balance owing to the French business house was £5,331 2s. 4d. The defendants had had the goods, and these had gone, on their order, to buyers in Pakistan.

The defendants raised some question upon the goods which had been delivered, and they did not pay the balance at the time at which they should have done so according to the contract. Thereupon the French house, or those responsible for the management of the French house of Baudelot, called upon Mr. Gibson-Fleming, a solicitor of the Supreme Court in this country, to advise them. He was a partner in the firm of solicitors who acted for the plaintiffs in this action. Mr. Gibson-Fleming went to Paris. He was in some doubt as to the proper way in which to describe the Établissement Baudelot, and he took the opinion of French lawyers on the subject. He was assured that as the three people were carrying on under the terms of the will, or were administering the estate, of the late Monsieur Baudelot, they should be regarded as a corporate body according to the laws of France. He gave evidence on the trial of this action, and one of his answers was: ". . . I went "to Paris and I interviewed a number of people in connexion "with this action and bespoke a large number of documents, "as I wished to get the general idea of the action. At that "time in Paris I put to certain gentlemen, who will be called "as witnesses, I believe, later on in this action—I put the "question to them as to what actually was the composition of "the Établissement Baudelot, and the answer I received was "that it was a corporate body and had a corporate status. I "further asked the question what sort of a corporate body it "was, and I was told that it was a 'société de fait' and also "a 'société indivisible.'"

Armed with that, and other, information Mr. Gibson-Fleming returned to London, and with his clients' approval commenced an action in the High Court of Justice, claiming against the defendant company the balance due and owing for goods sold and delivered. When he put the name of the plaintiff, or plaintiffs, on the writ he put "Établissement Baudelot" and in brackets "(a firm having corporate status under the laws of "the French Republic)." The words in brackets were struck out; they were never inserted on the writ as issued, but at the back of the writ the master added certain words. At the foot of the back of the writ the words appeared: "This writ "was issued by Messrs. Keene, Marsland & Co., whose address "for service is 52, Mark Lane, London, E.C.3, solicitors for "the said plaintiffs, a company incorporated according to the "laws of France, whose place of business is situate at Montereau, "France." Those words were added by reason of the necessity for endorsement of address, and of the practice which is set out on page 29 of the Annual Practice, 1952, under R.S.C., Ord. 4, r. 1.

The writ was issued on July 18, 1950; the statement of claim was delivered on January 16, 1951; the defence was delivered on March 22, 1951, and that defence was amended in October, 1952; with the defence there was delivered a counterclaim, a claim made by the defendants against the plaintiffs in respect of alleged breaches of contract.

Thereafter nothing was done for a long time, though there had been in 1951 certain correspondence between the plaintiffs' solicitors and the defendants' solicitors. On March 22, 1951, the defendants' solicitors wrote to the plaintiffs' solicitors: "Dear Sirs . . . In this action we write to point out that an "examination of the note paper used by your clients in their "correspondence with our clients gives no indication to support "the allegation that they are an incorporated body. Would "you be good enough to write us confirming that they are "incorporated—if such is the case—and also let us know the "names of the partners." That was a proper inquiry for the solicitors acting for the defendants to make if they did not already know. At the same time it is to be remembered that they had been in trading relations with the plaintiffs for some time. The plaintiffs' solicitors replied on March 27, 1951: "Dear Sirs, Baudelot and R. S. Graham & Co. Ld. We thank "you for your letter of March 22, and with regard to the "constitution of our clients we would inform you that we are "instructed that they are an incorporated body under French "law, which provides for the incorporation of the heirs of an "individual who carry on his business, the instrument of "incorporation being a testamentary document of the late "Monsieur Baudelot. We are informed that in French law "such a document can constitute incorporation according to "the law of that country, and we are further advised that as "such our clients are recognized as a body corporate. In the "circumstances we do not understand a request for the names "of the partners, but we are instructed that the names and "addresses of the principals of the business are as follow: "1. Madame Paul Baudelot, 84 Quai de la Rapee, Paris. 2. "Monsieur Alfred Jean Baudelot, 2 Rue du Val de Grace, "Paris. 3. Madame Vavasseur, of 5 Rue Medicis, Paris, wife "of Andre Louise Vavasseur and daughter of the late Monsieur "Paul Baudelot, whose proprietary functions are exercised by "the aforesaid Andre Louise Vavasseur." It was to be observed that in that letter the plaintiffs' solicitors give to the defendants the information which they had obtained. Attention was drawn to the words ". . . we are instructed that they are an incorporated body under French law . . . ." It had not been easy for Mr. Gibson-Fleming to find out precisely what the status of Établissement Baudelot was in France. He gave the information which had been given to him, the opinion of French lawyers on the position.

The defendants' solicitors replied on April 25 in a letter of which the concluding words were: "We gather that your clients "are in fact personal representatives of a deceased proprietor "which, at the most would surely make them a partnership, "and give them no right to sue, except in their individual names. "We shall be glad to have your further comments on the "matter." On April 26 the plaintiffs' solicitors replied: ". . . With "regard to your other letter concerning our clients' constitution, "we took up the matter with our French professional client, and "he is letting us have an opinion on the subject, and he has "informed us that, so far as he is aware, our clients have capacity "to sue in the name of 'Établissement Baudelot' against your "client by the provisions of French law, having regard to the "circumstances of this case, and in this respect also we do not "think that the provisions of English law will be found to be "very different."

If ever a firm of solicitors were ready and willing to put their cards on the table, the plaintiffs' solicitors were; they told the defendants the information which they had and the view of the law which had been put to them in France, and it is clear that the delays in this case had been in no way due to the conduct of the plaintiffs' solicitors, who seem to have behaved in the way one would expect a firm of solicitors to behave who were anxious to do their best for their clients according to the law in so far as they knew it, and in so far as they could discover it.

On July 14, 1952, a summons was issued by the defendants' solicitors for an order that the name of the plaintiff on the writ and all subsequent proceedings be struck out, and that the action be dismissed on the ground that the plaintiff was a non-existent person, and for an order that the plaintiffs' solicitors do pay to the defendants their costs of the said action. The application was made about 14 or 15 months after the correspondence above mentioned, and at the time it was made the action was just about to come on for trial. In view of that, the plaintiffs' solicitors on the next day, July 15, 1952, issued a summons asking "for "an order that the following names be added to the name of the "plaintiff in the writ and all subsequent proceedings, Madame "Paul Baudelot (Widow), Monsieur Alfred Jean Baudelot, "Madame Vavasseur (Married woman)." In other words, to save any question, the plaintiffs sought to add the names of the three people who were really interested in the estate of the late Monsieur Baudelot and who were carrying on the business.

When these two summonses came before the master he referred them to the judge before whom the action was to be tried. The action in fact was not heard in July by reason of the fact that the end of term was approaching; it was allowed to go over until October, and it came before Sellers J. on October 14, 1952.

The judge had to deal with the two summonses as well as with the merits of the action. With regard to the summonses, the judge thought that it was a case in which the plaintiffs ought to be allowed to amend; he allowed the amendments for which they asked; he continued the hearing, and after a discussion between counsel the figures were adjusted; the claim was reduced slightly, and judgment was entered for the plaintiffs, Établissement Baudelot, against the defendant company for the sum of £4,759 and costs.

The defendants appealed.

Leonard Caplan for the defendants.

Roland Adams Q.C. and *J. Donaldson* for the plaintiffs.*

The following cases, not mentioned in the judgments, were cited by counsel: *Salomon* v. *Salomon & Co. Ld.*[1]; *Simmons* v. *Liberal Opinion Ld., In re Dunn*[2]; and *W. Hill & Son* v. *Tannerhill.*[3]

SINGLETON L.J. The defendants appeal to this court not upon the amount—there is no doubt that the defendants have had the goods; there is no doubt that they owed to someone the sum of £4,759—but on what was treated by Sellers J. as a preliminary point. The submission which was made to the judge on the two summonses was that in the circumstances of this case leave to amend could not be given to the plaintiffs, and that the action as it stood was dead, and that judgment ought therefore to be entered for the defendants. The submission of Mr. Caplan in this court really comes to this: the writ was issued in the name of Établissement Baudelot, and at the foot of it after these words "Address for service" there were inserted the words:—"a company incorporated according to the laws of "France." There was no such company, said Mr. Caplan, and as no such company existed, the writ was bad and could not be amended.

His submissions were based on two cases which stated the principle. The first of those is *Clay* v. *Oxford*,[4] in which it was decided that where an action is commenced in the name of a dead man his representatives cannot be substituted as plaintiffs. I take six lines from the judgment of Baron Bramwell[5]: "It "cannot be said that this is an amendment 'necessary for the

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* Owing to the untimely death of the reporter, it is not possible to publish the argument in this case.

[1] [1897] A.C. 22.

[2] [1911] 1 K.B. 966.

[3] [1944] K.B. 472; 60 T.L.R. 410.

[4] (1866) L.R. 2 Ex. 54.

[5] Ibid. 55.

" 'purpose of determining in the existing suit the real question " 'in controversy between the parties,' nor is this an application " made between the parties to the suit; for there is no plaintiff, " and, therefore, no existing suit, and no question in controversy " between the parties." Upon that Mr. Caplan submitted that if the writ was issued in the name of a company which did not exist, that writ could not be amended.

The same principle was stated in the judgment of Russell J. in *Tetlow* v. *Orela Ld.*,[6] a case which was decided after R.S.C., Ord. 16, rr. 2 and 11, came into force. Russell J. said,[7] in dealing with rule 2 of Ord. 16, on which Mr. Adams relies in part for the plaintiffs: " In my opinion that rule means that, where " an action has been commenced between two living parties by " a living plaintiff, and the living plaintiff afterwards turns out " to be the wrong person, an application may be made to the " court, and the court can substitute another person for the living " plaintiff or may add another person as co-plaintiff as the case " may be. But it does not justify the court in creating a plaintiff " in an action for the first time."

The question thus arises: was there a plaintiff? Mr. Adams, for the plaintiffs, submitted that the writ was perfectly good; the plaintiff on the writ was Établissement Baudelot. He agreed that there might be an amendment necessary according to the practice, an amendment which would name the three people who constituted Établissement Baudelot, or who traded as such. He submitted that the fact that on the foot of the writ there appeared the words, " A company incorporated according to the laws of " France " was merely something to comply with the requirements of R.S.C., Ord. 4, r. 1, on endorsement of address, and that it did not go to the merits of this question. He submitted further that the point taken by Mr. Caplan that there was no plaintiff was wrong, for, said he, the defendants had traded with Établissement Baudelot; they knew what it was. The judge allowed the plaintiffs to amend by putting in the names of three partners (if that is the right description of them). The defendants knew all about them; it is not a case of a dead plaintiff; it is not a case of a bad writ; Établissement Baudelot existed, traded, and corresponded with the defendants; it existed as a body; it traded as a body; it occupied premises and paid taxes; it was a body consisting of three persons who were the successors in title of the late Monsieur Baudelot. Thus, Mr. Roland Adams

[6] [1920] 2 Ch. 24.

[7] Ibid. 26.

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submitted, the provisions of R.S.C., Ord. 16, r. 2, applied to this case. That rule is in these terms: "Where an action has been "commenced in the name of the wrong person as plaintiff, or "where it is doubtful whether it has been commenced in the "name of the right plaintiff, the court or a judge may, if satisfied "that it has been so commenced through a bona fide mistake, "and that it is necessary for the determination of the real matter "in dispute so to do, order any other person to be substituted or "added as plaintiff upon such terms as may be just."

It is said that the judge might have acted under rule 11 of Order 16, too. I do not think it is necessary to read that rule. Mr. Roland Adams drew our attention to R.S.C., Ord. 72, r. 2, which reads: "Where no other provision is made by the Act or "these rules, the present procedure and practice remain in force." He was not able to state very clearly what the practice and procedure on which he relied was at the time of the making of the rules. He put it generally in this way, that there is inherent power in the court to do that which is right and that which is justice. Mr. Caplan replied: At least, the authorities show that you cannot make an amendment if a party is dead or if that party never existed in law. Obviously there must be some limit.

In *Alexander Mountain & Co. (suing as a firm)* v. *Rumere Ld.*,[8] it was decided that: "In the case of the mere "misnomer of a plaintiff on a writ, the defendant, by a "summons supported by an affidavit, can compel the plain"tiff to amend. If the defendant does not exercise this "power, and the matter proceeds to trial, the misnomer can "then be amended, and in no circumstances can it affect "the substantive judgment which the court is called on to "pronounce." That was a judgment of the Court of Appeal consisting of Scott and Cohen L.JJ. The first judgment was given by Cohen L.J., who, having dealt with the facts, reached the conclusion that in that case there was merely a misnomer. The Lord Justice read from an article in the Law Journal newspaper of May 9, 1942, and said[9]: "With that statement of the "law I respectfully agree." The concluding part of the article (which is also referred to in the Annual Practice, 1952, at p. 11) is as follows: "This was the position up to the passing "of the Civil Procedure Act, 1833, section 11 of which abolished "pleas in abatement for misnomer altogether. It gave the

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[8] [1948] 2 K.B. 436; 64 T.L.R. 493; [1948] 2 All E.R. 482.

[9] [1948] 2 K.B. 436, 440–2.

"defendant the right, instead of pleading in abatement 'to "'cause the declaration to be amended at the cost of the "'plaintiff, by inserting the right name upon a judge's summons "'founded on an affidavit of the right name.' This Act is now "itself repealed, and all pleas in abatement are finally abolished "by Ord. 21, r. 20. A plaintiff, whether an individual or a "corporation is, of course, still required to bring his action in his "proper name. There does not appear to be any specific rule of "court dealing with the matter, nor do the rules of court deal "with misnomers in any way. It therefore appears that Order 72, "r. 2, applies; i.e., 'the present procedure and practice' (that is "the practice in force when the rules of 1883 were framed) "remains in force, and the defendant by summons, supported "by affidavit, could compel the plaintiff to amend. If he does "not do so, and the matter proceeds to trial, it is submitted that "the misnomer can then be amended, and that in no circumstances could the misnomer affect the substantive judgment "which the court is called upon to pronounce."

Amendment to correct a misnomer was within the power of the court before 1883, when the rules were framed; it is not expressly dealt with in the rules unless it can be said to be covered by the provisions of R.S.C., Ord. 16. I am inclined to think that Mr. Adams is right in regarding the two powers as quite separate; that would appear to be the view of the writer of the article in the Law Journal newspaper, which was adopted by Cohen L.J. as a correct statement of the law, and Scott L.J. agreed with the judgment of Cohen L.J. Thus Mr. Adams submitted: (a) the amendment is right under R.S.C., Ord. 16, r. 2; alternatively, (b) the power to allow amendment of that which is no more than a misnomer is inherent in the court.

I should add that in *Belgian Economic Mission* v. *A. P. & E. Singer Ld.*,[10] Devlin J. had made an order for the amendment of the writ by substituting as plaintiffs instead of the Belgian Economic Mission "Paul Van Zeeland in his capacity as Ministre "des Affaires Etrangères et du Commerce Extérieur suing on "behalf of the Kingdom of Belgium." In that case there was an appeal, and the Court of Appeal held that the amendment was properly made.

I have formed the view that Sellers J. was right in allowing the amendment. I think that it could be allowed under the provisions of R.S.C., Ord. 16, r. 2, and that it is therefore unnecessary to go further into the powers under the inherent jurisdiction of the court. I need hardly say that it is satisfactory to me to find that there was power to make such an order. The money is due and owing from a company trading in this country to Établissement Baudelot who carry on business in France. The English company has had the goods from France; the money is due. The defendants' solicitors were quite right to inquire in 1951 as to who really was the plaintiff, or who were the plaintiffs, if there was any doubt about it. It may be that they were right to raise the question before Sellers J., though I think that they ought to have raised it earlier if they were going to raise it. Sellers J. decided that there was power to amend, and the French traders were able to obtain judgment against those in this country who had contracted to buy their goods and had had those goods supplied to them.

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[10] [1950] W.N. 418.

The French plaintiffs, under the advice of their solicitors, thought it right to bring their action in this country. They need not have done so. I could wish that there had not been an appeal after Sellers J. gave leave to amend. It adds to everyone's costs; it keeps the plaintiffs out of their money, and they must wonder what is happening to the courts in England of which they used to hear good reports. There is another consideration: people in this country are anxious to do trade with other countries; we depend on trade to live. An appeal on a technical matter of this kind is not really helpful.

In my view the judgment of Sellers J. was right, and this appeal ought to be dismissed.

Birkett L.J. I agree with the judgment which has just been delivered by my Lord. I share his satisfaction that we are able to arrive at the decision at which we have arrived, because from a very early stage in this case I felt that if the contention which was made here by Mr. Caplan were to succeed it would be no misuse of language to say that there had been a failure to do justice, and I do not think it can be put better than it was put by Sellers J. in his judgment: ". . . In "all its circumstances in no sense in order to assist justice, but "as it seems to me, in an endeavour to defeat it, because it "appeared in the course of this case, in addition to the facts "which I have stated briefly as to the history of this litigation "—it was perhaps not without significance that the two months "of June and July were active months in relation to what was "being done or sought to be done with a case in this country—"I think it was in June that the defendants thought fit to "commence an action in France raising similar matters to those "which are raised in this action. It would appear, and it is "an inference I think which stands out, that the aim would "be in those proceedings to postpone proceedings in this court "which have been in existence since 1950 and to proceed, as, "indeed, there were indications there was an endeavour to "proceed, rapidly with the proceedings in France. That is "conduct which this court does not countenance except in so "far as it has unquestionable merit which justifies it, and the "matter that comes before me is one as to whether there is "any justification in law for the submission which the defen"dants make."

I would like to say one or two words about the background of the circumstances out of which this appeal springs, because I think it is not unimportant. It would appear that at Montereau in France was a trading concern which, according to its notepaper, traded under the name of Établissement Baudelot; they were manufacturers of all sorts of commodities, but amongst them they made firebricks; and it would appear that the defendants in this case, an English company, entered into commercial relations with that trading concern, Établissement Baudelot, and so long ago as March, 1949 (and be it observed that we are now in December, 1952). The two parties entered into fairly extensive contracts for the supply of firebricks. The written contract, of course, is not before us, but the plaintiffs state that the contract was made orally and in writing. There is no question that for months and months these two parties had been trading together, and that there had been a payment by the defendants to the plaintiffs of 15,000,000 francs. There remained due and owing a sum of about 5,000,000 francs for goods which admittedly had been delivered, but which had not been paid for.

Accordingly, on July 18, 1950, a writ was issued against the defendants in the name of this trading concern, Établissement Baudelot. They set out in the statement of claim, which was delivered in January, 1951, the nature of the contracts, the compromise that had been made when disputes had arisen on the payments which had been made on account, and all the relations between the parties. In March, 1951, the defendants put in their defence, and stated in paragraph 1: "Save that "it is admitted that the plaintiffs carry on business in France "as manufacturers and merchants of firebricks, no admissions "are made as to paragraph 1 of the statement of claim." They then went on to deal with the contract which had been entered into between the parties, and it is to be observed that on the date when they delivered their defence and counterclaim, on March 22, they began a correspondence which is not without importance in this case, and which has been referred to by my Lord.

The first letter, dated March 22, 1951, was sent by the defendants raising the question whether the plaintiffs were an incorporated body. Nothing had been said in the defence about that, and that would appear to be the first time, two years after the original contract, that the point was raised. Then there was the answer of March 27, 1951, in which the solicitors stated that on the advice they had the plaintiffs were an incorporated body, and then went on to state the names of the principals. There was a further letter on April 25, 1951, from the defendants' solicitors still discussing the same point, and a final answer on April 26, reaffirming the plaintiffs' position with regard to the corporate body. There, apparently, for the time being the matter rested.

Up to July, 1952, the last letter to which I have made reference being on April 26, 1951, nothing appears to have been said about this point at all, and, indeed, we are informed that on June 16, 1951, a date was fixed for the hearing of the action. Nothing was raised about this point then. For some reason that date was not acceptable, and a further date, July 21, 1952, was substituted. Again no question was raised as to the corporate body. Then on July 14, 1952, which would be a week before the actual date of the hearing, a summons was taken out by the defendants to dismiss the action on the ground that the plaintiffs were non-existent, and calling on the solicitors to pay the costs.

I must say that with that background in mind, it does seem to me most extraordinary, and I think most regrettable, that an English firm of standing and repute, and, I accept from Mr. Caplan, of substance, should take this point at that time in those circumstances. I think it regrettable for this reason: first of all, the commercial prestige of this country when dealing with other nations has long been a matter of pride, so that people all over the world have been ready to rely on, and to trust, English good faith and the English good name. Secondly, I think it was regrettable for this reason, that when the law is invoked and it is said that the law will give countenance and support to a step of this kind taken in those circumstances at that time, I think that also affects not merely commercial relations, not merely the standing of commercial prestige, but it affects the administration of the law, and I share the view which my Lord expressed, that it is a matter of some satisfaction to feel that this particular matter is not likely to succeed so far as English courts are concerned.

In a word, Mr. Caplan, who argued this matter with great pertinacity and with considerable courage, confessed, as I understood him, that he stood in this court entirely without merits. There was an indication towards the end of his argument of something more meritorious, but on analysis he was saying: "I make this point, and I acknowledge that it has no "merit; it is a mere technicality." I can understand technical points being insisted upon where the circumstances of the case are such that a technicality is justified, but I can find nothing whatever in this case to suggest that a technicality of this kind ought to have been resorted to. The good faith of the plaintiffs is not impugned; the good faith of the solicitor acting for the plaintiffs is not impugned; indeed, Mr. Caplan went out of his way to say that no one could have acted with more propriety than did the solicitor for the plaintiffs. When this point was raised in the correspondence he did his utmost to give satisfaction; he said, as the fact was: "We have taken advice "about this rather difficult matter of French law, and this is "the advice we have been given, and I pass it on to you," and he reaffirmed it, and he added, too, "But since you ask for "the names of the principals, here they are." And so from first to last in this case I can see no shadow of ground on which it might be said: "I know it is a technical point, but there are "circumstances which warrant me in insisting upon it," indeed, on the contrary, it is a technical point without any merits of any kind.

Mr. Caplan asserted and affirmed, which for his argument to succeed he must establish, viz., that a writ had been issued in the name of a non-existent person or body. That being so, he said, the authorities which dealt with the case of a dead man —and he referred to *Clay* v. *Oxford*[11] and *Tetlow* v. *Orela Ld.*[12] —supported him. "This writ," said he, "was issued in the "name of a corporate body; there was no such corporate body;

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[11] L.R. 2 Ex. 54.

[12] [1920] 2 Ch. 24.

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"there never had been such corporate body; therefore the plaintiffs never existed, and the writ being in the name of a "non-existent person, the action was dead and judgment should "be given for the defendants."

Sellers J., on this issue, said: ". . . I unhesitatingly accept "that view that the rule is not wide enough to permit me to "accede to the plaintiffs' application to join these three named "partners in this action, if, in fact, the action was from the "outset brought by a party in circumstances comparable to "those two cases of a dead man." So the argument below, and the argument here, was: "That is the doctrine by which "we stand and upon which we found this argument, that you "have brought an action and issued a writ in circumstances "comparable to those where the plaintiff is a dead man."

The writ was in the name of the Établissement Baudelot and it is important to notice that the statement that the plaintiffs are a corporate body appeared at the end of the back of the writ where the plaintiffs' solicitor, in compliance with R.S.C., Ord. 4, r. 1, wrote: "This writ was issued by Messrs. Keene, "Marsland & Company whose address for service is 52, Mark "Lane, London, E.C.3, solicitors for the said plaintiffs, a "company incorporated according to the laws of France, whose "place of business is situate at Montereau, France." Mr. Caplan said that that addition to the address, to comply, as it was thought, with R.S.C., Ord. 4, r. 1, vitiates the whole action and that the plaintiffs cannot amend the writ, since it was a writ in the name of a non-existent person.

It was clear, according to Mr. Caplan's argument, that he would have to establish two propositions:—First of all, he said that he must show that the circumstances in this case were truly comparable to the cases dealing with a dead man; and that if he did not do that, he should fail; and he further submitted (and I think the importance of this can scarcely be exaggerated) that had those words attached to the address of the plaintiffs "a "company incorporated according to the laws of France" been omitted, all would have been well, inasmuch as by powers of amendment, if amendment be necessary, everything could have been made right. It was the addition of those words which he said made this case comparable with those where the plaintiff was a non-existent person.

The first question to be determined is: was the plaintiffs' description in the writ, "Établissement Baudelot," one of existent or of non-existent persons? It does not settle the issue to state whether a corporate body is existent or non-existent, because it has been conceded (though the judge did not seem very clear whether the position was right or wrong) that the Établissement Baudelot was not a corporate body; he said that he might be wrong about that, but I assume for the purpose of this case that it was not a corporate body. Nevertheless, I think that the first inquiry in order to establish this argument is whether Établissement Baudelot represented something existing. The answer to that question can only be that it did; it existed, certainly, so far as this case is concerned, from March, 1949, right down to the day of the hearing as a trading concern, using a neutral expression. It has in fact traded with the defendants, delivering to them goods and receiving payment from them, and when difficulties arose it made a compromise on various points of difference, as appears from the statement of claim. It was plain from the headed notepaper, and from the transactions, that this trading concern existed.

The second question is: does it make any difference, so far as the remedy is concerned, that those words were added to comply with R.S.C., Ord. 4, r. 1? I think myself that the proper way to regard that is that the statement was a misnomer. It was said: here is the name of the plaintiffs; they have existed, are existing, to your knowledge; they are existing, but merely because they are described in that way it does not alter the fundamental question whether they exist or not, and it is idle to say that the question is whether they exist as a corporate body, because it has been conceded in this case that this description of them as a corporate body was mistaken. I think for my own part that the provisions of R.S.C., Ord. 72, r. 2, are quite sufficient to enable this court to deal with the situation which has here arisen, and I think that it would be a great pity if this court were not able so to do. In my view, the judgment of Sellers J., in which he reviewed all the evidence and the contentions put forward about the existence of this trading concern, is right, and ought to be supported. The appeal, therefore, ought to be dismissed.

MORRIS L.J. I am in agreement with the judgments which have been delivered. It seems to me that the solicitors for the plaintiffs made their position entirely clear. When asked for information they said in the letter of March 27, 1951: " . . . with regard to the constitution of our clients we would " inform you that we are instructed that they are an incorporated " body under French law, which provides for the incorporation of

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"the heirs of an individual who carry on his business, the "instrument of incorporation being a testamentary document of "the late Monsieur Baudelot." They made it clear that they had been advised that those for whom they acted were the heirs of the individual, Monsieur Baudelot, who carried on his business, and who, as a result, by French law, were incorporated. The solicitors thereupon issued the writ in the name of "Établissement Baudelot."

The judge, having heard the whole of the evidence, including the evidence of French law, decided, though not without some hesitation, that "Établissement Baudelot" was not in fact an incorporated body. It does not follow from that that this writ was issued in the name of a non-existent company. It was not. It was issued in the name, or the trading name, used in their continuing trading activities by three living trading active persons.

I concur fully with all that my Lords have said.

Appeal dismissed.

Solicitors: *Crawley & de Reya; Keene, Marsland & Co.*

C. G. M.

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July 3, 14.

Somervell and Jenkins L.JJ.

CHANTREY MARTIN (A FIRM) *v.* MARTIN.

Practice—Discovery—Chartered accountant—Audit of client's accounts—Working accounts and other papers produced in preparation of final audit—Property in—Disclosure.

Working accounts and other papers which are brought into existence by chartered accountants in the preparation of a final audit of a client's books are the property of the accountants and not of the client; and in the event of litigation to which the accountants are party, such accounts and papers, if relating to matters in question in the litigation, are proper to be disclosed to the other party.

Leicestershire County Council v. *Michael Faraday & Partners Ld.* [1941] 2 K.B. 205; 57 T.L.R. 572; [1941] 2 All E.R. 483 followed.

Gibbon v. *Pease* [1905] 1 K.B. 810; 21 T.L.R. 365 and *Ex parte Horsfall* (1827) 7 B. & C. 528 distinguished.

Decision of Barry J. reversed.

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APPEAL from Barry J. (in chambers).

The plaintiffs, Chantrey Martin & Co., were a firm of chartered accountants, and according to the statement of claim endorsed on the writ, the defendant Martin was in their employment from about July 18, 1951, to April 22, 1952, as a senior audit clerk at a salary of £43 6s. 8d. per calendar month, payable in advance on the first day of each month. They alleged that on the last-mentioned date the defendant, in breach of his contract of service, absented himself from his duties without leave or notice, thus terminating his employment without notice either given or received, and without reasonable cause. The plaintiffs therefore claimed to recover from the defendant a sum of £93 13s. 4d., made up of one month's salary paid in advance, one month's salary in lieu of notice, and £7 alleged to have been lent to the defendant by the plaintiffs.

The defendant, by his defence and counterclaim, denied the alleged breach of contract; contended that on April 18, 1952, the plaintiffs had wrongfully dismissed him from his employment; and counterclaimed £130, being three months' salary in lieu of notice.

In his particulars he alleged that in auditing, in the course of his duties, the books of a limited company, a client of the plaintiffs, he discovered certain irregularities in the company's audited accounts for a previous year; that he reported the irregularities to the senior partner of the plaintiffs' firm, who refused to allow any adjustments to be made, and who summarily dismissed him when he refused to be a party to finalizing the draft accounts and making the tax computations unless the suggested adjustments were made.

In their reply the plaintiffs denied the allegations of irregularities in the draft and audited accounts of the client company for 1950, and also the alleged wrongful dismissal of the defendant.

By a summons the defendant obtained from a master an order for the disclosure of certain documents relating to the auditing of the client company's accounts which the plaintiffs admitted having in their possession, but for which they claimed privilege on the ground that they were the property of the client company.

On appeal to him Barry J. reversed the master's decision, and the defendant now appealed.

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Ashe Lincoln Q.C. and *Lloyd-Davies* for the defendant. Before the master the plaintiffs took the point that the defendant could not call for disclosure of these working accounts because the plaintiffs held them merely as agents for their client. That was rejected by the master, who held that the accountants, as independent professional men, had produced the accounts by their own skill and work, and that the ownership vested in them and not in the client. The judge reversed that decision, holding, apparently on the authority of *Gibbon* v. *Pease*,[1] that the documents were the property of the client and therefore the accountants had no right to disclose them. There appears to be no direct authority of this court as to the position of an accountant.

[SOMERVELL L.J. What are working accounts?]

Papers produced by accountants in the course of preparing a profit and loss account, and the computation of tax. In *Leicestershire County Council* v. *Michael Faraday & Partners Ld.*[2] the Court of Appeal, holding that the relationship between the county council and rating valuers was that of client and a professional man and not that of principal and agent, decided that documents, maps and plans prepared by the valuers in carrying out their expert duties were their own property. See also *London School Board* v. *Northcroft*,[3] approved in the *Leicestershire* case.[2] *Gibbon* v. *Pease* [4] was concerned with the ownership of completed plans prepared by an architect, and is to be distinguished. So also is *Ex parte Horsfall*,[5] where drafts and copies of deeds prepared by an attorney were held to be the property of his client, because the client, having paid for everything, was entitled to possession. A solicitor is in a special position.

Where an accountant is employed to produce a profit and loss account a term might be implied in the contract that without the consent of the client he should not publish the document to the whole world; but if the accountant wants to make use of the account for his own private purpose it is submitted that he would be entitled so to use it; and anyone who is engaged in litigation to which the document is germane is entitled to have disclosure. If the document is in the hands of the client the client can, it is submitted, be required to produce it, if it is germane to the litigation.

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[1] [1905] 1 K.B. 810; 21 T.L.R. 365.

[2] [1941] 2 K.B. 205; 57 T.L.R. 572; [1941] 2 All E.R. 483.

[3] (1889) Hudson on Building Contracts, 4th ed., Vol. 2, p. 147.

[4] [1905] 1 K.B. 810.

[5] (1827) 7 B. & C. 528.

Leon MacLaren for the plaintiffs. There appears to be no direct authority on the relationship of accountant and client, but it is submitted that an accountant is the agent of his principal in rather the same way as a solicitor. The documents which a solicitor brings into being in the process of litigation are the property of his client, and if another solicitor comes into the case he may demand all the papers from the original solicitor.

[JENKINS L.J. All the documents which a solicitor produces are included in his bill of costs and are paid for by the client.]

So, also, an accountant charges for each piece of work which he does in carrying out an audit.

[SOMERVELL L.J. Is there any authority that where documents are relevant to litigation the court will not make an order for disclosure because it would be a breach of the rights of a third party?]

I do not know of any authority as to the power of limited disclosure. The documents in question are in law the property of the client and the agent cannot be compelled to produce them if they are in the agent's possession.

Ashe Lincoln Q.C. replied.

Cur. adv. vult.

July 14. JENKINS L.J., reading the judgment of the court, said: This is an appeal by the defendant from an order of Barry J., dated June 4, 1953, allowing an appeal by the plaintiffs from a master's order, dated May 22, 1953, which had ordered the production by the plaintiffs of certain documents disclosed in their affidavit of documents as relevant documents in their possession or power, which they objected to produce on the grounds stated in such affidavit. The question in the appeal is whether the judge was right in holding that the grounds relied on by the plaintiffs were sufficient in law to entitle them to refuse production of all or any, and if so which, of these admittedly relevant documents.

[His Lordship stated the facts, and the nature of the claim, defence and counterclaim, and continued:] The circumstances on which the defendant's allegation of wrongful dismissal is based are set out in particulars contained in the defence and amplified in further and better particulars subsequently delivered, pursuant to a request by the plaintiffs. The short effect of these particulars was that in March, 1952, the defendant, in the course of his duties, commenced an audit for the financial year ending August 31, 1951, of the books of a certain limited company which was a client of the plaintiffs, the method being to take the figures for the financial year ending August 31, 1950 and to build up the next year's figures with reference to the appropriate heading of the previous year; that in the course of such audit the defendant discovered certain irregularities in the audited accounts for the year ending August 31, 1950, which the plaintiffs had audited; that prior to April 18, 1952, he had discussed his draft accounts for the year ending August 31, 1951, and the audited accounts for the previous year, with the plaintiffs' senior partner, H. G. Martin, and had suggested adjustments to correct the irregularities he had detected; that that partner refused to allow these adjustments to be made and ordered the defendant to make tax computations on the basis of the unadjusted accounts; and that on April 18, 1952, after a further discussion of the accounts in question, in which the partner maintained his former attitude, the defendant told the partner that he would not be a party to finalizing the draft accounts or making the tax computations unless the suggested adjustments were made; whereupon the partner, acting for the plaintiffs, summarily dismissed him. The alleged irregularities in the accounts in question, as particularized by the defendant, included understatement of sales, understatement of gross profit, and understatement of administration expenses and salaries, and were (in effect) alleged by the defendant to be calculated to mislead the shareholders and to evade payment of the proper amount of tax on the profits of the client company.

The plaintiffs, in their reply, denied the whole of the defendant's allegations of irregularities in the draft and audited accounts of the client company and also denied the alleged dismissal of the defendant.

Such being the nature of the case on the pleadings, it could not well be disputed that all documents in the plaintiffs' possession or power relating to the preparation of the client company's accounts for the years ending August 31, 1950 and 1951, are documents relating to matters in question in the action, and therefore proper to be disclosed. As we have already mentioned, they were in fact duly included in the plaintiffs' affidavit of documents, but with an objection taken in the body of the affidavit to their production, the validity of this objection being the subject of the present appeal.

The objection was taken by the plaintiffs in their affidavit of documents in these terms: "We object to produce any of the "documents set forth in the second part of the first schedule

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"hereto on the grounds following: (a) As to certain of the "documents numbered in the said part of the said schedule, "such documents are the property of 'the client company' . . . "and are in the plaintiffs' custody possession or power solely "as accountants to the said 'client company' and not otherwise."

The documents in question are those lettered (A) to (K) in the second part of the first schedule to the affidavit, namely: "(A) The file or files of all working papers and schedules "relating to the audit for the year ended 31/8/50 of the books "of 'the client company' clients of the plaintiffs. (B) The "first draft accounts of 'the client company' for the year "ended 31/8/50 as prepared by Mr. Fradd. (C) Partial re-draft "of the accounts of 'the client company' for year ended "31/8/50. (D) the final typed accounts of 'the client com-"'pany' for year ended 31/8/50. (E) The correspondence "between plaintiffs and the Inland Revenue in regard to these "accounts and the tax computations thereon. (F) the private "ledger of 'the client company' containing entries for the year "ended 31/8/50. (G) The file or files of all working papers and "schedules relating to the audit for the year ended 31/8/51 of "the books of 'the client company.' (H) The draft accounts "of 'the client company' for the year ended 31/8/51. (I) Notes "and calculations relating to these draft accounts made by Mr. "H. G. Martin during the course of his discussion with the "defendant on these matters and attached to the said file of "working papers. (J) The draft tax computation relating to the "said draft account prepared by the defendant and his notes "and comments written thereon. (K) The private ledgers of "'the client company' containing entries for the year ended "31/8/51."

It seems clear that "possession or power" for the purposes of an order for production under the Rules of the Supreme Court, Ord. 31, r. 14, as distinct from inclusion in an affidavit of documents under r. 12 of the same Order, does not mean actual corporeal possession irrespective of legal ownership, but sole legal possession, conferring on the party against whom production is sought a right and power to deal with the documents in question. Thus a party will not be ordered to produce a document which, though in his actual corporeal or physical possession, belongs wholly to a third party or to a third party jointly with himself: see *Kearsley* v. *Philips*.[1] It follows that

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[1] (1882) 10 Q.B.D. 36, 40; (1883) 10 Q.B.D. 465 (C.A.).

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no order for production could properly be made in respect of the private ledgers of the client company comprized in items (F) and (K) above, for these are clearly the property of the client company and not of the plaintiffs. This is recognized by the defendant, who makes no claim to production in respect of items (F) and (K).

We have no note of the judge's reasons for deciding that the remainder of the documents listed above should not be produced, but we were told by counsel that his decision was based on *Gibbon* v. *Pease*,[2] where it was held that the plans prepared by an architect, employed by a building owner to carry out alterations to certain houses, were the property of the building owner. It would seem, therefore, that the judge took the view that the working papers, drafts, notes, calculations, and typed final accounts, brought into being by the plaintiffs in the course of, or as preliminaries to, the auditing of the client company's accounts, and the ascertainment of its tax liability, were by parity of reasoning the property of the client company, and accordingly that on the principle above stated the plaintiffs should not be compelled to produce them.

The ratio decidendi in *Gibbon* v. *Pease* is thus stated by Lord Collins M.R.[3]: "In my opinion the contract in this case "resulted in the making of plans the property in which passed "to the building owner on payment of the remuneration provided "under the contract. I find a difficulty in distinguishing this "case from that of a contract to paint a picture or to design a "coat of arms, as to which no question of ownership could "arise." There are, however, other cases, to which we understand the judge was not referred, in which a different conclusion was reached in circumstances bearing a closer resemblance to those of the present case. In *Leicestershire County Council* v. *Michael Faraday & Partners Ld.*,[4] rating valuers were employed by a county council for five years to give advice and assistance in connexion with the valuation of hereditaments in the council's area, and at the termination of the five years' agreement the council claimed to be entitled to all documents, books, maps and plans which had been prepared by or had come into the possession of the valuers in the course of, or for the purpose of, the performance of their duties. The Court of Appeal (affirming Macnaghten J.) rejected that claim, and held that the relationship between the county council and the valuers was that of client and professional man and not that of principal and agent; that the documents which the valuers had prepared in carrying out their expert work were their own property; and that, as the agreement did not contain any provision requiring the valuers to hand over the documents to the plaintiffs, they were not bound to hand them over.

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[2] [1905] 1 K.B. 810; 21 T.L.R. 365.

[3] [1905] 1 K.B. 810, 813.

[4] [1941] 2 K.B. 205; 57 T.L.R. 572; [1941] 2 All E.R. 483.

In an earlier case, *London School Board* v. *Northcroft*,[5] of which approval was expressed in the *Leicestershire County Council* case,[4] a similar conclusion was reached by A. L. Smith J. with respect to certain papers of calculations and memoranda prepared by quantity surveyors in the course of their employment by building owners on work which they had duly completed. Having regard to these two authorities we think that the proper conclusion in the present case is that (apart from correspondence with the Inland Revenue comprised in item (E), to which we will return) all the documents listed above, other than the client company's ledgers, are the property of the plaintiffs.

This conclusion is not, we think, displaced by *Ex parte Horsfall*,[6] to which we were also referred, where drafts and copies of deeds prepared by an attorney were held to be the property of the client. The case proceeded on the short ground that "he who pays for the drafts, etc., by law has a right to "the possession of them," and was, we think, rightly explained by Mr. Ashe Lincoln, for the defendant, as turning upon the nature of the services rendered by an attorney or solicitor and the system upon which he is remunerated for those services. Even in the case of a solicitor there must, we should have thought, be instances of memoranda, notes, etc., made by him for his own information in the course of his business which remain his property, although brought into existence in connexion with work done for clients.

It was, however, contended for the plaintiffs that even though these documents were their own property they should not be ordered to be produced, because they embodied information which was the subject of professional confidence as between the plaintiffs and the client company, and their production, and the consequent disclosure of their contents, would be a breach by the plaintiffs of their duty to the client company. Outside the area of legal professional privilege, which is not in question here, we do not think that this is a sufficient ground for refusing an order for production. In Bray on Discovery (1885), at p. 194, we find this general proposition: "It is no ground for resisting "production that a person not before the court has an interest "in the document: *Kettlewell* v. *Barstow*[7]; unless it is an "interest in the nature of property." In developing this proposition, at p. 206, the author said that "the mere fact that the "giving of the discovery will involve a breach of confidence as "against some third person or in any way affect or prejudice his "interests does not constitute of itself an independent objection "to giving the discovery, a disclosure under the compulsion of "the court being for this purpose distinguished from a voluntary "disclosure out of court."

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[4] [1941] 2 K.B. 205.

[5] Hudson on Building Contracts, 4th ed., Vol. 2, p. 147.

[6] 7 B. & C. 528.

Applying this statement of the law to the present case, we think that (apart from the correspondence with the Inland Revenue) all the documents above listed (other than the ledgers) should be produced, but we think that the order should be made upon an undertaking by the defendant and the defendant's solicitors not to divulge their contents to any person otherwise than for the purposes of the present litigation, and not to use the information contained therein for any collateral purpose.

As to the correspondence with the Inland Revenue, this presumably comprises letters received from the Inland Revenue and copies of the letters written to the Inland Revenue. In conducting this correspondence the plaintiffs must, as it seems to us, have been acting as agents for the client company for the purpose of settling with the Inland Revenue the client company's tax liability. In *Leicestershire County Council* v. *Michael Faraday & Partners Ld.*[8] MacKinnon L.J. distinguished that case from cases such as *Gibbon* v. *Pease*[9] in these words: ". . . but "I think that those cases are radically different from the present "case, as being concerned with the relative rights and duties "of principal and agent. If an agent brings into existence "certain documents while in the employment of his principal, "they are the principal's documents and the principal can claim "that the agent should hand them over."

We are accordingly of opinion that these letters (both the copies of those sent and the originals of those received) should be considered as the property of the client company, with the result that on the principle above stated the plaintiffs should not be ordered to produce them.

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[7] (1872) L.R. 7 Ch. 686, 693.

[8] [1941] 2 K.B. 205, 216.

[9] [1905] 1 K.B. 810.

Accordingly, with the exception we have just stated, we would allow this appeal.

Appeal allowed.

Solicitors: *B. L. Harris & Co.; Nash, Field & Co.*

A. W. G.

SVENSKA TRAKTOR AKTIEBOLAGET *v.* MARITIME AGENCIES (SOUTHAMPTON) LD.

1953
June 4, 5, 8, 11.

Pilcher J.

[1951 S. No. 2334.]

Shipping — Bill of lading — Deck cargo — Hague Rules — "Steamer "has liberty to carry goods on deck" — Deck cargo of tractors carried—Tractor lost overboard—Liability for loss—Carriage of Goods by Sea Act, 1924 (14 *&* 15 *Geo.* 5, *c.* 22), *s.* 1, *art. I* (*c*), *III*, *rr.* 2, 8, *IV*, *r*2.

A clause "steamer has liberty to carry goods on deck and ship-"owners will not be responsible for any loss, damage or claim "arising therefrom" in a bill of lading which expressly incorporates the Carriage of Goods by Sea Act, 1924, does not amount, where goods are so carried, to a statement in the bill of lading that the goods are carried on deck sufficient to exclude the obligations imposed by the Act of 1924 on the shipowner or to exclude goods so carried from the definition of "goods" in Article I (*c*) of the Schedule to that Act. Although the second part of such a clause infringes Article III, r. 8, and is void, the liberty to carry on deck is effective and does not affect the shipowner's right to carry deck cargo subject to the obligation by Article III, r. 2, to "properly "and carefully, load, handle, stow, carry, keep, care for and dis-"charge the goods carried."

There would be a breach of Article III, r. 2, if there was a real risk that cargo stowed on deck with every precaution might yet be damaged or lost in normal weather conditions.

Where goods have been shipped and not delivered, or delivered damaged, the carrier is liable under the Act unless he can prove affirmatively that he has taken reasonable care of the goods whilst they were in his custody, and that the loss or damage falls within one of the immunities specified in Article IV, r. 2.

W. R. Varnish & Co. Ld. v. *"Kheti" (Owners)* (1949) 82 Ll.L.R. 525 distinguished.

[Reported by Miss P. STANLEY, Barrister-at-Law.]

ACTION.

The plaintiffs, a Swedish company, were the consignees named in a bill of lading dated October 16, 1950, expressly incorporating the Carriage of Goods by Sea Act, 1924,[1] covering 50 Allis-Chalmers tractors loaded on board the motor vessel *Glory* for carriage from Southampton to Stockholm. The bill of lading, which was signed by the master of the *Glory*, was on the printed form of Maritime Agencies (Southampton) Ld., the defendants. It was agreed that for the purpose of this action references in the bill of lading to " owners," " ship owners " or " carriers " should be regarded as references to the defendants, who were in fact the charterers of the *Glory*.

The *Glory* was a small motor vessel of about 350 tons, and at the material time the ship had a free board of about 5 feet 6 inches and was some 2 feet or so light of her marks; the coamings of No. 1 hatch, on which the tractor which was lost was stowed, were roughly 5 feet in height. Of the 50 tractors covered by the bill of lading, 34 were stowed below decks and the balance of 16 were stowed on Nos. 1 and 2 hatches. There was a dispute as to the number of tractors stowed on No. 1 hatch—three, four or possibly five being stowed at the aft end on the port side of the hatch. They rested on their wheels on the tarpaulins which covered No. 1 hatch, their brakes were on and the tractors were in gear with their wheels " interlocked." No. 1 hatch was about 15 feet 6 inches in width.

At or about 6.30 p.m. on October 16, 1950, all the tractors were loaded on board and the *Glory* cast off her moorings and left her berth. The tractors on No. 1 hatch were not finally lashed and secured until the vessel was well down Southampton Water. Throughout October 17, the wind was from the south-west and varying between force 3 and 6. On the early morning of October 18, the wind veered to west-north-west and it remained throughout the morning watch at between force 5 and 6. The sea at the material time was a moderate swell of average length. The *Glory's* course was north-east. At 4 o'clock in the morning the course was altered and the wind, being from the westward was approximately on her port beam. During the 4 to 8 watch the tractor, which forms the subject-matter of this action, was washed overboard.

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[1] Carriage of Goods by Sea Act, 1924, s. 1: " Subject to the provisions " of this Act, the Rules shall have " effect in relation to and in connexion with the carriage of goods " by sea in ships carrying goods from " any port in Great Britain or " Northern Ireland to any other port " whether in or outside Great Britain " or Northern Ireland."

Schedule, art. 1 (*c*): " ' Goods ' " includes goods, wares, merchandises, and articles of every kind " whatsoever, except live animals and " cargo which by the contract of " carriage is stated as being carried " on deck and is so carried."

Art. III, r. 2: " Subject to the provisions of Article IV, the carrier " shall properly and carefully load, " handle, stow, carry, keep, care for " and discharge the goods carried."

Art. III, r. 8: " Any clause, " covenant or agreement in a contract of carriage relieving the " carrier or the ship from liability for " loss or damage to or in connexion " with goods arising from negligence, " fault or failure in the duties and " obligations provided in this Article " or lessening such liability otherwise " than as provided in these Rules, " shall be null and void and of no " effect."

Art. IV, r. 2: " Neither the carrier " nor the ship shall be responsible for " loss or damage arising or resulting " from . . . (*c*) perils, dangers and " accidents of the sea or other " navigable waters."

The plaintiffs claimed damages for breach of contract and/or duty in or about the carriage of their goods by sea and alleged that it was the duty of the defendants under the bill of lading and/or under the Carriage of Goods by Sea Act, 1924, and/or as carriers for reward properly and carefully to stow, carry, keep, care for and discharge all the tractors and their equipment.

The defendants denied that any duty rested upon them as was alleged, denied any negligence on their part, and relied upon the clause in the bill of lading: " Steamer has liberty to " carry goods on deck and shipowners will not be responsible " for any loss damage or claim arising therefrom " to escape liability for any loss to the plaintiffs; alternatively, they relied on the defence " perils or accident of the sea " under Article IV, 2, of the Schedule to the Act.

Michael Kerr for the plaintiff consignees. The bill of lading was subject to the Act of 1924, since it was an outward shipment and the " tractors " were " goods " within the meaning of article I (*c*) of the schedule thereto. The tractors were not within the exception specified in article I (*c*) because although they were carried on deck they were not stated to be so carried in the contract of carriage. A statement that the owners have liberty to carry on deck is not sufficient to take the goods out of the article—there must be a positive statement that they are to be so carried. Since the contract was subject to the Act, the second part of the exceptions clause was clearly void by article III, r. 8. Further, as the liberty to carry on deck is all part of the same clause as the provision so avoided, the whole clause is avoided by article III, r. 8, which relates to " any clause . . . " Hence there was no liberty to carry on deck. If that is wrong, the liberty to carry on deck is subject to article III, r. 2, and either (*a*) the carriage on deck per se was not "proper carriage," or (*b*) if it was, then the manner of carrying was "improper." Finally the burden of proof was on the defendants (Carver, Carriage of Goods by Sea, 9th ed., p. 185). It was a case of res ipsa loquitur.

H. V. Brandon for the defendant carriers. The contract was not one within the Act of 1924 because the tractors were not "goods" within Article I (*c*); they were not "goods" because the liberty to carry on deck by giving notice to the consignor that the tractors might be so carried, sufficed to satisfy the spirit of the exception in article I (*c*). "Stated as being carried on deck" is equivalent to "stated to be liable or permitted to be carried on deck"; thus there was an agreement outside the Act which excluded article I (*c*). [*Varnish & Co., Ld.* v. "*Kheti*" (*Owners*)[1] was referred to.] The clause excuses even the owner's own negligence because "arising therefrom" is a reference to causation sufficient to cover negligence. Alternatively, the clause should be read disjunctively, and then, inasmuch as the first part does not offend against the Act, it should remain. The owners were entitled to rely on the statutory exceptions to the owner's liability for loss, and in particular on the exception of perils of the sea within article IV, r. 2 (*c*). The carriage itself was perfectly proper and the loss fortuitous; the loss itself occurred through the perils of the sea.

Pilcher J. having stated the facts continued: To pass on to the legal aspects of the case, one Etheridge, who was the representative of the shippers, was present during the last part of the loading of the vessel, and he was called as a witness. He was aware that some of the tractors were being stowed on the hatches, and he made no protest. The plaintiffs had, so far as I know, no knowledge where and exactly how this particular consignment of tractors was going to be stowed, and there was no evidence that they had agreed, expressly or impliedly, to any stowage on deck. I am satisfied that the contract of carriage between the shippers and carriers (who for this purpose I take to be the defendants) is evidenced by the bill of lading and by no other document. The plaintiffs, as the named consignees in the bill of lading, have of course all the rights of shippers in respect of any breach of the contract evidenced by the bill of lading. Throughout this judgment I shall refer to the defendants as the "shipowners" or the "carriers."

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[1] (1949) 82 Ll.L.R. 525.

The bill of lading is subject to the Carriage of Goods by Sea Act, 1924, and is expressed so to be. The clause incorporating the Act is in these terms: "All the terms, provisions and con-"ditions of the Carriage of Goods by Sea Act, 1924, and the "Schedule thereto, are to apply to the contract contained in "this bill of lading and the carriers are to be entitled to the "benefit of all privileges, rights and immunities contained in "such Act, and the Schedule thereto, as if the same were "herein specifically set out. If, or to the extent that, any terms "of this bill of lading is repugnant to or inconsistent with any-"thing of such Act or Schedule, it shall be void." There the matter is expressed, and even if it had not been so expressed it would have been implied by law. The next clause to which I ought to refer is the following which occurs in line 76: "Steamer has liberty to carry goods on deck and shipowners "will not be responsible for any loss, damage, or claim arising "therefrom." The bill of lading contains on its face no statement that any particular goods were being shipped on deck, and that leads me to consider the section of the Act and the articles of the Schedule which have been referred to in argument. [His Lordship then referred to section 1 of the Act and Article 1 (*c*) of the Schedule to the Act.]

It was submitted on behalf of the defendants that while there was admittedly no specific statement on the face of the bill of lading that any of these tractors were being carried on deck, the clause in the bill of lading giving liberty to the vessel to carry goods on deck, amounted to an agreement between the parties that the steamer was entitled so to carry goods, and, it being common ground that the particular tractor which was lost was in fact shipped on deck, the clause giving liberty to ship on deck amounted in all the circumstances to a statement that the tractor was in fact shipped on deck sufficient to satisfy Article 1 (*c*) of the Schedule, and thus to exclude the tractor in question from the definition of "goods" to which the Act applies. In my view that submission is quite untenable. The intention of the Act and Schedule in relation to deck cargo appears to me to be reasonably clear. At common law a shipowner is only authorized to stow goods on deck in certain circumstances: the principle is set out accurately in Scrutton on Charter Parties, 15th ed., at p. 157, as follows: "The shipowner "or master will only be authorized to stow goods on deck; "(1) by a custom binding in the trade, or port of loading, to "stow on deck goods of that class on such a voyage; or "(2) by express agreement with the shipper of the particular "goods so to stow them. The effect of deck stowage not so "authorized will be to set aside the exceptions of the charter "or bill of lading and to render the shipowner liable under his "contract of carriage for damage happening to such goods."

The policy of the Carriage of Goods by Sea Act, 1924, was to regulate the relationship between the shipowner and the owner of goods along well-known lines. In excluding from the definition of "goods," the carriage of which was subject to the Act, cargo carried on deck and stated to be so carried, the intention of the Act was, in my view, to leave the shipowner free to carry deck cargo on his own conditions, and unaffected by the obligations imposed on him by the Act in any case in which he would, apart from the Act, have been entitled to carry such cargo on deck, provided that the cargo in question was in fact carried on deck and that the bill of lading covering it contained on its face a statement that the particular cargo was being so carried. Such a statement on the face of the bill of lading would serve as a notification and a warning to consignees and indorsees of the bill of lading to whom the property in the goods passed under the terms of section 1 of the Bill of Lading Act, 1855, that the goods which they were to take were being shipped as deck cargo. They would thus have full knowledge of the facts when accepting the documents and would know that the carriage of the goods on deck was not subject to the Act. If, on the other hand, there was no specific agreement between the parties as to the carriage on deck, and no statement on the face of the bill of lading that goods carried on deck had in fact been so carried, the consignees or indorsees of the bill of lading would be entitled to assume that the goods were goods the carriage of which could only be performed by the shipowner subject to the obligations imposed on him by the Act. A mere general liberty to carry goods on deck is not in my view a statement in the contract of carriage that the goods are in fact being carried on deck. To hold otherwise would in my view do violence to the ordinary meaning of the words of Article I (*c*). I hold, accordingly, that the plaintiffs' tractors were being carried by the shipowners subject to the obligations imposed upon them by Article III, r. 2, of the Act.

The next question is: Was the shipowner in those circumstances entitled to carry the tractors or any of them on deck? The clause in the bill of lading at line 76 which purports to grant to the shipowner a liberty to ship goods on deck is in two parts, and in my view it is reasonably clear that the second part of the clause offends and must offend against Article III, r. 8, of the Schedule to the Act and cannot be relied upon by the shipowner. Mr. Brandon, for the defendants, argued, relying upon the case of *W. R. Varnish & Co. Ld.* v. "*Kheti*" (*Owners*),[1] that it was possible to say that the second part of the clause did not offend against the Act. That was a case depending very much on its own facts, in which the Carriage of Goods by Sea Act, 1924, was only incorporated by contract, and in which a rubber stamp clause was superimposed upon the bill of lading. It is a case which must be confined to its own facts, and, in my view, it is no authority for the proposition advanced by Mr. Brandon.

If the whole of the line in the bill of lading which comprises this clause is to be regarded as one clause, it is argued on behalf of the plaintiffs that the whole clause must be taken to offend against the Act, and that with the second part of the clause goes the first part which purports to give the ship liberty to take deck cargo. Counsel for the defendants argued that the clause should be read disjunctively, and that, inasmuch as the first portion did not offend against the Act it should be allowed to remain, and that, consequently, it could not be said that, in shipping some tractors on deck, the owners had committed such a fundamental breach of their obligation under the contract of carriage as to disentitle them from relying on any of the statutory exceptions, and in particular on the exception of perils of the seas. The two portions of the clause under consideration are connected by the conjunction "and" without any stop. The second part offends against the Act and the first part does not. While, in the view which I take of the facts, the point in this case has not any practical importance, I am inclined to think that Mr. Brandon is right and I proceed upon the assumption that the shipowners had liberty to ship cargo on deck, subject always to their obligations under Article III, r. 2, properly and carefully to load, handle, stow, carry, keep and care for the goods in question.

In this state of affairs, and on the facts proved or admitted, the shipowner is in some difficulty. The wind and sea conditions were, and were admitted by the master, to be normal for the month of October in the North Sea. The vessel's course necessarily involved her getting the wind and sea on her port beam, and there was nothing odd or abnormal about that. The vessel was light of her marks, and no doubt with her deck cargo she rolled considerably. All these were matters which must or ought to have been anticipated by the master. The master's view was that there was inevitably a risk that deck cargo of this sort, even if lashed, with every proper precaution might come adrift and be lost overboard in normal conditions of wind and sea. While I do not agree with those views expressed by the master, even if they were correct they would not in my view avail the defendants, because if there was a real risk that the tractors if loaded on deck with every proper precaution might yet be damaged or lost in normal weather conditions, the master in so loading them would be in breach of his obligations under Article III, r. 2, properly and carefully to stow and carry the goods in question, and his owners would be responsible for any loss or damage to the deck cargo as a result of the master's breach. As I have said, however, I do not accept the view expressed by the master, and I am satisfied that if properly lashed these tractors could have been carried safely to their destination in the normal weather conditions which in fact prevailed. I am content to rest my conclusion with regard to the insufficiency of the lashing of this deck cargo on the fact that the ropes connecting the tractors to each other were insufficient in size or strength and were not sufficiently tended. In addition to that, I feel that it is more than likely that the wires by which the block of tractors was secured were not tended and tautened as they should have been.

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[1] (1949) 82 Ll.L.R. 525.

I have indicated my view as to how this unfortunate accident occurred, but the case might almost have been decided on the principle of res ipsa loquitur. I appreciate that the mere fact that the force of the wind and the strength of the sea were not abnormal does not necessarily disentitle a shipowner, when cargo is lost or damaged, from relying upon the exception of perils of the sea, but in order to be entitled to rely upon this exception the shipowner must establish that the loss was fortuitous, that it was due to some unforeseen incursion of seawater, either over the deck or into the ship, which could not have been avoided by proper care on his part. In this case there is no evidence of any fortuitous or unexpected peril. The master seems to have encountered exactly the kind of weather he expected to encounter and exactly the type of weather which in his view might easily result in the loss of deck cargo, even though properly stowed and secured.

One does not need to know a great deal about the sea to appreciate that a little coaster like the *Glory*, in the conditions of wind and sea which she is likely to encounter in October in the North Sea, may easily have her foredeck covered by the seas as she rolls, according to the direction of the wind in relation to her course. It is quite clear that that is what happened to the *Glory*, and it is exactly what the master expected. She shipped, I suppose, the normal amount of water which was to be expected over her deck and fore hatch; that is what was and should have been clear to the master was going to occur, and if it did occur it was imperative that he should take great care with regard not only to the original lashing of the deck cargo, but to the tending and tautening of the lashings as the voyage proceeded. If tractors which have a fairly high side and weigh about one ton each are loaded on the fore hatch of a little craft like the *Glory*, reasonable care demands that they should be most firmly secured. This tractor was swept away in normal conditions of wind and sea, and that in itself raises a very strong presumption that it was not adequately secured.

That leads me to consider quite broadly the question of the burden of proof. The position under the Carriage of Goods by Sea Act, 1924, in that respect is conveniently set out in Carver's Carriage of Goods by Sea, 9th ed., p. 185, where, dealing with the question of onus of proof in the case of damage or loss, the editor says this: "The effect of those words is that if the goods "owner proves that the goods shipped have not been delivered, "or have been damaged after shipment, the carrier is liable "unless he can prove affirmatively (i) that he has taken reason-"able care of the goods while they were in his custody and (ii) that "the loss or damage falls within one of the immunities specified "in Article IV, r. 2."

Although I have indicated why I think this tractor came adrift, it was quite unnecessary for me to have done so. I could have left the matter simply on the burden of proof, observing that the tractor had not been delivered to its destination and considered whether the shipowner had satisfied me that he had in the circumstances exercised reasonable care, and found that he had not so satisfied me. He certainly has not, and I think that this tractor was lost owing to the lack of care in its original lashing and in the subsequent tending of the lashings by which it and the other two tractors on No. 1 hatch were secured. The result, therefore, is that the plaintiffs succeed and are entitled to recover judgment for the sum claimed, namely, £316 4s. 2d., with interest.

Judgment for the plaintiffs.

Solicitors: *Ince, Roscoe, Wilson & Griggs; Holman, Fenwick & Willan.*

C. A.
1953
June 22, 23.

Evershed M.R., Birkett and Romer L.JJ.

McDONALD *v.* JOHN TWINAME LD.

[Plaint No. A. 253.]

Contract—Apprenticeship agreement—Execution by apprentice, not by master—Master's rubber stamp—Subsequent adoption and affirmation to third party—Whether enforceable against master—Summary dismissal of apprentice—Whether breach of agreement —Apprentices Act, 1814 (54 *Geo.* 3, *c.* 96), *s.* 2.

An apprenticeship agreement was signed by the apprentice and his guardian, but not by the company instructing him, though the name of the company was inserted with a rubber stamp in the agreement. About a year later, the apprentice was conscripted for military service, but he applied for deferment, and his formal application to the Ministry of Labour and National Service was supported by a certificate from the company that the conscript was serving as their apprentice, giving particulars and enclosing a copy of the apprenticeship agreement. The copy was inaccurate in that it purported to have been fully executed by the signatures of all parties. Subsequently, the apprentice was dismissed summarily for insubordination. On a claim by the apprentice for damages for wrongful dismissal:—

Held, that, (1) as the company had acted on the agreement and had taken the benefit of the covenants by the apprentice, they must be treated as having executed it as a deed, even if in fact they had not done so.

Rex v. *St. Peters-on-the-Hill* (1741) 2 Bott's Poor Laws 367, and *Rex* v. *Fleet* (1777) Cald.Mag.Cas. 31; 2 Bott's Poor Laws 371, followed.

(2) By affirming the contract to the Ministry of Labour and National Service the company had shown that the rubber stamp insertion of the name of the company in the original agreement was made with the authority of the company, and that insertion was, therefore, sufficient to constitute an entering into of a written agreement with the apprentice so as to satisfy the requirements of section 2 of the Apprentices Act, 1814.

(3) Though on the facts as found, the apprentice might have committed a breach of the terms of the agreement, that breach was not such as made the continued relationship of master and

apprentice impossible and, therefore, the master was not entitled, according to the terms of the agreement, summarily to dismiss the apprentice.

Waterman v. *Fryer* [1922] 1 K.B. 499; 38 T.L.R. 87, and *Learoyd* v. *Brook* [1891] 1 Q.B. 431; 7 T.L.R. 236, distinguished.

Appeal from Judge Fenwick Q.C. sitting at Workington County Court.

In 1947, the plaintiff, Vincent McDonald, then a boy nearly 16 years old, offered his services to the defendants, John Twiname Ld. as an apprentice plasterer, and was taken on informally for a period of probation. No agreement or written contract was entered into at that time, but throughout the period of probation he was acting as an apprentice. In 1948 or 1949, the exact date being uncertain, the defendant company sent to the plaintiff a form entitled "Deed of Apprenticeship," apparently in common form, which read: "This deed of apprenticeship made "the day of between John Twiname Ld., Hill "Crest, Brigham, Cockermouth [that name being inserted by a "rubber stamp] (hereinafter called 'the master') of the first "part"; there was then a blank which was intended to be filled in by reference to the boy's guardian, "of the second part." The apprentice's name followed, "Vincent McDonald of 4, Christian "Street, Harrington, Workington (hereinafter called 'the apprentice') of the third part," and provision was made for adding a representative of the local joint apprenticeship committee, but instead that space was utilized by the boy's guardian, who wrote "Joseph McDonald of 4, Christian Street, Harrington (hereinafter called 'the representative') of the fourth part." The word "plasterer" was inserted in manuscript to show the craft which the apprentice was to learn. The date and term were given as five years from October 10, 1947. The final line of the document read: "In witness whereof the parties hereto have "hereunto set their hands and seals," with a marginal note "Strike out if the master is not a limited company," and that attestation clause was struck out in ink. There followed the parts of the document prepared for the execution of the parties and witnesses, the first being: "The common seal of . . . Ld. . . . "was hereunto affixed in the presence of . . ." There was a space on the right with the usual indication where the seal should go. Similar provision was made for execution by the other three parties, the guardian, the apprentice and the representative.

In the blank space which followed the words "The common "seal of . . ." a rubber stamp representation of the company's name, John Twiname Ld., was again inserted, but there was no execution by anybody in the space provided for execution by the master. The next part, appropriate where the master was not a limited company, was struck out. The guardian of the boy, and the boy himself, signed in the presence of some person apparently, named "Brown," but no address or description was given.

The document, with the name "John Twiname Ld.," having been impressed in those two places, was sent to the boy, executed by him and by his father and returned. It was then sent to the local area apprenticeship committee but, for reasons which are not material, they returned it and nothing more was done with it. The relationship of master and apprentice continued, regulated by the terms of that deed until, in 1949, the apprentice was called for military service. In January, 1950, he applied for deferment to the Ministry of Labour and National Service, using the form appropriate to the deferment of an apprentice and describing himself as an apprentice plasterer with the firm of John Twiname Ld. On the back of the form, as was required, the master clearly endorsed and supported the application of the apprentice. The name of the employer was again put on with a rubber stamp, "John Twiname Ld.," and the address and the date were inserted in writing. The assistant secretary of the company then certified as follows: "I certify that the man named in Part I is serving as "an apprentice with the above named employer and that the "particulars shown in Part I are correct," and he signed it. The particulars in Part I stated, among other things, that the apprenticeship was governed by a five years' written agreement, and there was sent with the application what purported to be a copy of that agreement, which was identical with the original executed by the plaintiff except that there were significant differences in the way in which some of the blanks had been filled in. The mistake made by the boy's guardian, for example, who in the original had inserted his name in the space reserved for the representative of the local committee, was rectified, the fourth party to the deed being expressed to be the West Cumberland Building Trades Association. Further, their participation in the deed was authenticated (without any foundation of fact) by a purported signature on their behalf, and, finally, the copy showed plainly John Twiname Ld, the company, as having executed the deed, that name being inserted not only as in the original, but also in the position where the master should have executed and against the indication of the affixing of the master's seal.

In October, 1950, and November, 1951, the defendants sent further certificates to the Ministry of Labour and National Service that the plaintiff was still working for them as an "apprentice" plasterer and that he was making satisfactory progress, and deferment from military service was granted to the plaintiff over this period. Subsequently, however, the apprentice became insolent and insubordinate and, after trouble with other workmen, he was summarily dismissed. He brought proceedings, claiming that he had been wrongly dismissed and that as a result he had suffered the loss of earnings amounting to £71 10s. Judge Fenwick dismissed his claim and he now appealed.

John Thompson for the plaintiff. The plaintiff was bound by the "deed" he had signed although, since the master had not executed, the deed was incomplete; and the master, having for several years accepted the benefit of the apprentice's covenants contained in the deed, it does not now lie in his mouth to deny that he is bound by it: Halsbury's Laws of England, 2nd ed., Vol. 10, pp. 214, 267. If the apprentice is bound by the deed it is not essential that the master should execute in order to be bound: *Rex* v. *St. Peters-on-the-Hill* [1] and *Rex* v. *Fleet.*[2] The statutory requirement that an apprenticeship deed should be in writing was directed to the protection of the infant apprentice: *Kirkby* v. *Taylor* [3]; and it would be a misapplication to use it as a weapon against him.

On the facts the defendants have acknowledged and affirmed that there was an apprenticeship agreement binding on them and they cannot now deny it. There is sufficient in the written documents when construed together and orally explained, as is permissible, to constitute an agreement in writing sufficient to satisfy the Apprentices Act, 1814, for it is enough to prove that the contract was evidenced by a memorandum in writing which would satisfy section 4 of the Statute of Frauds. [Reference was made to *Rann* v. *Hughes.*[4]] In *Kirkby* v. *Taylor* [5] the necessity for writing was considered, but the so-called contract in writing in that case was no more than an oral contract evidenced in writing, and it is submitted that that would be sufficient here. The terms evidenced in writing were those of the document which the plaintiff had executed, and which the defendants had acknowledged to be correctly stated by the plaintiff in his application for deferment.

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[1] (1741) 2 Bott's Poor Laws 367.

[2] (1777) Cald.Mag.Cas. 31; 2 Bott's Poor Laws 371.

[3] [1910] 1 K.B. 529; 26 T.L.R. 246.

[4] (1797) 7 Term Rep. 348, 350.

[5] [1910] 1 K.B. 529.

N. W. M. Sellers for the defendant company. The plaintiff was working as an apprentice, but in fact there was no contract of apprenticeship between him and the company which would be enforceable either by virtue of the Statute of Elizabeth I (5 Eliz. 1, c. 4), or the Apprentices Act, 1814. Since 1814 an apprenticeship need no longer be by deed, but the contract must be in writing. Here, however, there was not even a contract evidenced in writing sufficient to satisfy the Statute of Frauds. The purported copy sent to the Ministry of Labour is not admissible in evidence because it is, on the face of it, only a copy and, therefore, the original would have to be produced. But even if it might be used as evidence of what was sent to the Ministry of Labour, it would not be admissible as evidence that there was a contract between the master and the plaintiff; nor could it be used to show that the master was estopped from denying the existence of a contract. The plaintiff must prove that there was a contract in writing, but he cannot do so by relying on estoppel, for estoppel is not an offensive weapon. He must rely on the original deed, but as that was not signed by the master in the space provided it was not executed: Chitty on Contracts, 20th ed., p. 132. The mere insertion of the master's name by means of a rubber stamp in the body of the document is not a sufficient execution, for the company could only validly execute by affixing their seal: Halsbury's Laws of England, 2nd ed., Vol. 10, p. 215. Further, it was plainly intended that the company should put their seal to the document in the space provided. The insertion of the rubber stamp was not, therefore, the intended execution even if it be shown that the stamp was put on with the authority of the company. There is, however, no evidence as to the intention of the company, and it is submitted that such evidence would not, in fact, be admissible. It is, of course, possible to have unbound "apprentices" serving under unenforceable contracts of service. There was, undoubtedly, a contract of service, and if, after the customary period of probationary service, a contract of apprenticeship had been entered into, the apprenticeship term would have been antedated to the commencement of the probationary period; but here no apprenticeship contract, whether oral or written, was ever made. The master, admittedly, has had the benefit of the apprentice's covenants, but that was not a one-sided benefit to him, for the apprentice had the benefit of the master's tuition.

Not only was there no written contract, but there was not even a contract evidenced in writing sufficient to satisfy the Statute of

Frauds, for a memorandum, for the purpose of section 4 of that Act, must point to the existence of a contract. Here, however, the plaintiff has said that there was never any oral contract of apprenticeship (as distinct from a contract of service). The purported copy of the deed and the correspondence with the Ministry of Labour, even if admissible, does not amount to a contract in writing between the company and the plaintiff, for it was with a third party. The terms of the apprenticeship would, no doubt, be those required by the relevant trade union, but there was no contract on those or any other terms which was evidenced by a memorandum in writing signed by the party to be charged as required by the Statute of Frauds. Nor are the terms certain, for the commencement of the term is not known. Normally, the term would run from the date of execution, unless otherwise stated, but this deed was never executed. It cannot run from the date when the plaintiff commenced service, for he was not then an apprentice, nor from the time when he signed the deed, for he might have signed the document and not returned it. It was essential for the seal of the company to be affixed if the deed was to be effectively executed by the company.

[EVERSHED M.R. A signature on behalf of the company may bind the company even though the seal is not affixed, and even a printed signature may be sufficient if it was intended to have that effect: see *Cohen* v. *Roche*.[6]]

[*Thompson*, intervening, referred to *Evans* v. *Hoare*.[7]]

Cohen v. *Roche*[8] was a case on the Statute of Frauds, but more is required in a deed of apprenticeship. Even if the company had intended to sign and their rubber stamp had been put on as intended execution, as to which there is no evidence, the document would not be properly executed for the representative of the Joint Committee was a necessary party and he, plainly, repudiated the document and refused to sign it.

It was submitted for the plaintiff that it was not essential for the master to sign if he had accepted the contract by acting on it, and reliance was placed on *Rex* v. *St. Peter's-on-the-Hill*[9] and *Rex* v. *Fleet*.[10] Both those cases are distinguishable from the present case, for in each of them the contract of service came into being because of the indenture, and there was probably also consideration paid to the master. There was here a pre-existing contract of service in the nature of apprenticeship to which the document was incidental, and the document did not confer any benefits other than those already, in fact, enjoyed by the apprentice, and none were in reality conferred on the master. In *Rex* v. *Fleet*[10] the indenture was entered into before the justices, and there was plainly a parole contract, but here the deed was sent to the plaintiff by post, without comment, and there was no contemporaneous oral contract of apprenticeship.

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[6] [1927] 1 K.B. 169; 42 T.L.R. 674.

[7] [1892] 1 Q.B. 593; 8 T.L.R. 441.

[8] [1927] 1 K.B. 169.

[9] 2 Bott's Poor Laws 367.

[10] Cald.Mag.Cas. 31.

It was also submitted for the plaintiff that the requirements of the Statute of Frauds were sufficient to satisfy section 2 of the Apprenticeship Act, 1814, but that provision seems to require that the agreement be entered into in writing, and it is difficult to see how subsequent assertions to a third party, even if evidence of an agreement in writing (which, it is submitted, they are not), could in any circumstances amount to a contract in writing. [Reference was made to Halsbury's Laws of England, 2nd ed., Vol. 13, p. 530.]

By the terms of the contract the plaintiff was under a duty to conduct himself properly, and the defendants were in the circumstances justified in dismissing him. If the contract was, as the plaintiff submitted, binding on both master and apprentice, the remedy for the apprentice in the case of an unjustifiable dismissal by the master was that provided by the terms of the contract. He cannot take proceedings in the courts. It is conceded that an apprentice can only be dismissed summarily in exceptional cases, but the authorities do not show clearly how far the servant may go: *Waterman* v. *Fryer*[11]; *Wise* v. *Wilson*[12]; *Winstone* v. *Linn*,[13] and *Learoyd* v. *Brook*.[14] Here the judge found that the plaintiff was guilty of subversive conduct and that workmen were leaving the company because of him. His conduct was endangering the company's business and it is submitted that that was sufficient ground for his dismissal even if it be admitted that he was an apprentice. It would, of course, be even clearer ground for summary dismissal if he were a servant. At the time when the cases cited were decided apprentices stood in greater need of protection than they now do, and it is submitted that conduct of a less serious nature than was formerly necessary may now be a sufficient ground to justify dismissal.

Thompson, in reply. It was not necessary for the company to affix the seal in order to execute the deed effectively, for section 32 of the Companies Act, 1948, provides that a seal is not required if a private individual could contract in writing. There is a contract in writing here, and it is not essential for the master to sign it in order that it should be binding on him (though in fact it is signed by the insertion of the rubber stamp), since he has acknowledged the contract.

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[10] Cald.Mag.Cas. 31.

[11] [1922] 1 K.B. 499; 38 T.L.R. 87.

[12] (1845) 1 Car. & Kir. 662.

[13] (1823) 1 B. & C. 460.

[14] [1891] 1 Q.B. 431; 7 T.L.R. 236.

Evershed M.R. This is an appeal against the dismissal of a claim made by one Vincent McDonald for damages for the wrongful determination by summary dismissal of what he alleges was a valid and effectual apprenticeship agreement. Several points have been argued and it may be convenient, first, to deal with a submission made by Mr. Sellers, for the defendants. He contends that, whether or not there was a valid and enforceable apprenticeship agreement, the conduct of the plaintiff (who appears after a time to have developed a conceit and insolence and to have thereafter indulged in insubordination) amounted to subversive conduct of a kind such that his continued presence on the defendants' premises was an embarrassment, not only to the management, but also to the workmen employed there, and such that it entitled the company, in any event, to dismiss him summarily. I cannot help feeling some sympathy with the defendants having regard to the findings of fact as to the plaintiff's foolish conduct; but I agree with Judge Fenwick that, assuming that the plaintiff was in truth an apprentice, his conduct was not such as entitled the master to exercise the remedy of summary dismissal. Beyond doubt, on the assumption again that an apprenticeship agreement was subsisting, the plaintiff's conduct involved a breach of one of its express terms, namely: "That during the "continuance of the apprenticeship the apprentice will faithfully "and honestly serve the master as his apprentice and be diligent "to learn the craft aforesaid," which was that of plasterer, "and "will at all times willingly obey and perform the lawful and "reasonable commands and requirements of the master." But the document itself provides a remedy for the master in the event of the master being dissatisfied with the behaviour of the apprentice. In other words, I think the case falls short of the extreme examples, to which reference was made in *Waterman* v. *Fryer*,[1] which was cited by Mr. Sellers; for instance, the example in *Learoyd* v. *Brook*,[2] where the apprentice had the habit of stealing and so made the continued relationship of master and apprentice wholly impossible.

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[1] [1922] 1 K.B. 499.

[2] [1891] 1 Q.B. 431.

There might have been much to be said for the argument that certain conduct on the master's part would estop him from denying the existence of an effective apprenticeship agreement. It is well settled that estoppel is not, and cannot be turned into, a cause of action; but I am not satisfied, having regard to the nature of the claim, that if a plea of estoppel was open to the plaintiff he would be making use of it as a cause of action rather than as an answer to a defence. I am, however, quite satisfied that the point of estoppel was not taken in the court below and, indeed, Mr. Thompson, himself, did not take it in opening his appeal. No question, therefore, arises for our determination whether the master could be said to have been so estopped from contending that there never was a valid or effective apprenticeship agreement.

The only point which remains is whether there was in operation at the relevant date an enforceable apprenticeship agreement. The plaintiff relies on the existence of an apprenticeship agreement, or deed, and he alleges that it has been wrongfully broken. In order to discover what constitutes an effective apprenticeship agreement, it will be necessary to refer briefly to the relevant statute law, the Statute of Elizabeth I (5 Eliz. 1, c. 4), and the Apprentices Act, 1814 (54 Geo. 3, c. 96). Until the Act of 1814 an apprentice had to be bound by deed, but that Act considerably modified that requirement. Section 2 of the Act, which is intituled "An Act to amend an Act passed in the "fifth year of Queen Elizabeth, intituled 'An Act containing "'divers orders for artificers, labourers, servants of husbandry, "'and apprentices,'" provides: "Whereas by the said statute [5 "Eliz. 1, c. 4] divers rules and regulations were enacted respect"ing the qualifications of persons entitled to take and become "apprentices, and the term of years for which such apprentices "should be bound, and as to the mode of binding such apprentices; "and it was also enacted by the said statute that all indentures, "covenants, promises, and bargains of and for the having, taking, "or keeping of any apprentice otherwise thereafter to be made "or taken than is by the said statute limited, ordained, and "appointed, should be clearly void in the law to all intents and "purposes; and that every person that should from thenceforth "take or newly retain any apprentice contrary to the tenor and "true meaning of the said Act, should forfeit and lose for every "apprentice so by him taken the sum of ten pounds: and whereas "it is expedient that so much of the said recited Act should be "repealed: be it therefore enacted, that so much of the said "recited Act shall be and the same is hereby repealed; and that "it shall and may be lawful for any person to take or retain or "become an apprentice, though not according to the provisions "of the said Act; and that indentures, deeds, and agreements in "writing entered into for that purpose, which would be otherwise "valid and effectual, shall be valid and effectual in law, the repeal "of so much of the said Act as is herein last above recited not-"withstanding." The exact extent of the repeal and of the subsequent enactment is not free from obscurity, a view which is supported by the circumstance that in my copy of the statute the section which I have read is followed by the query "To how "much and what part of sections 25 to 30 of the Elizabethan "Act does the above enactment apply?" It is not necessary for the court to answer all those problems. I think this much is plain, that whereas before the passing of this Act a deed was necessary to create a valid contract of apprenticeship, it now suffices if an apprenticeship agreement in writing is entered into by the parties to be bound by it. No other question as to validity arises in the present case, for example, as to the length of service or otherwise.

[His Lordship referred to the facts substantially as set out above and continued:] It is plain that, from the time when the apprenticeship agreement was returned to the master by the local apprenticeship committee the relationship between the defendants and the plaintiff was regarded by both master and apprentice as regulated, and it was in fact regulated by the terms of the written document of apprenticeship. The execution by the boy and his father, we must assume, was execution by them as their deed: the agreement had not been executed by the defendants in the sense of having the common seal of the company affixed to it, but only (if at all) by the placing of the stamped name of the company upon it in the two places [as stated above]. If the matter had rested there it would be doubtful, to put it no higher, whether the terms of the Act of 1814 had been satisfied. But the matter does not rest there.

[His Lordship then referred to the calling up for military service of the apprentice and the application for deferment and continued:] The certificate given by the defendants in support of the application for deferment would have been inappropriate on the face of the form unless there had been a written agreement. It is plain that the copy deed was made out and filled in by the defendants. [His Lordship referred to the differences between the copy deed and the original and continued:] Judge Fenwick, I venture to think, fell into an error in regard to the copy deed of apprenticeship for he seems to have thought that the question was whether it was admissible as evidence of the original document. That, however, is not so. The judge said: "In "1950 Twiname's wrote a letter to the Ministry of Labour. . . . "I have come to the conclusion that that document is admissible "in evidence for the purpose of the Statute of Frauds. I so "admit it and no further." In my judgment, no question arises in regard to the Statute of Frauds. We are not concerned with the question whether there was an oral agreement of which there is a memorandum in writing. We are concerned to see whether section 2 of the Act of 1814 has been satisfied, namely whether there is a written agreement of apprenticeship which was entered into by the defendants. The purpose of the copy document which was attached to the application for deferment and sent to the Ministry of Labour was not to give evidence of the contents of the original deed, which are not in doubt, but to prove the independent fact that the defendants were showing in 1950 by their certificate that the affixing to the original deed of name "John Twiname Ld.," with a rubber stamp, that being a printed signature of a limited company, was done with their authority, either as equivalent to a signature, or so as to indicate that the defendants were in truth entering into the apprenticeship document. That is the purpose for which the plaintiff seeks to use this document and for such purpose, in my judgment, it is plainly admissible in evidence.

There is, however, in my opinion, a further ground on which the plaintiff must be entitled to succeed. The facts show that the original so-called "deed" was executed as such by the plaintiff and by his father, but was not executed as a deed by the master. From the date of its execution, however, it seems to me plain that the defendants regarded themselves as governed in their relations to the plaintiff by the terms of the deed, and they took the benefit of it and of such services as he rendered, as is shown by the circumstance that the defendants supported the apprentice's application for deferment. On those facts I think that the two cases which Mr. Thompson cited in opening, *Rex* v. *St. Peters-on-the-Hill*[3] and *Rex* v. *Fleet*[4] are authority for the view that though the defendants did not execute this deed, they must be treated as bound by it, as if they had executed it, and as satisfying the requirements of the Statute of Elizabeth I. In each of the two cases cited a young person had been taken on by a master as an apprentice. In each case the apprentice had executed a deed but the master had not. The master, however, was held to be bound as though he or she had so executed. Mr. Sellers made the point that there was an essential distinction between those two cases and the present. He said that in those two cases there was never any relationship between the master and the apprentice until the deed executed by the latter came into existence, whereas in this case there was the earlier relationship from the time when the plaintiff offered himself as an apprentice to the defendants. But though there is that difference, it is not, I think, significant; for the plaintiff was never taken on in any other capacity than as an apprentice, though until this document came into existence the statutory requirements in regard to apprenticeships had not been satisfied. On the authority of those two cases, therefore, the plaintiff must be entitled to succeed and to make good his submission that the master must be treated in this action as though he had executed the original agreement as a deed.

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[3] 2 Bott's Poor Laws 367.

[4] Cald.Mag.Cas. 31; 2 Bott's Poor Laws 371.

I have already indicated, that the plaintiff might also be entitled to claim that the Act of 1814 was satisfied in that the affixing of the stamped name "John Twiname Ld." must be treated as having constituted an "entering into" a written agreement by the master, a fact which the later certificate of the master and the copy agreement attached to it seems to me to have indicated clearly. A limited company can sign a document by means of some duly authorized person putting the company's printed signature to the document or by impressing the printed name of the company to the document, and such a signature will suffice as a proper execution except in cases where the common seal of the company must be affixed: and the execution of an apprenticeship agreement, as I read section 32 of the Companies Act, 1948, is not such a case. On that ground I think the plaintiff might well succeed in showing that the company did enter into an agreement in writing; but it is sufficient for the plaintiff to rely on his first point, namely, that there was here a deed or its equivalent and, accordingly, that the defendants must be treated as bound by the terms of the so-called "deed of apprenticeship."

The result of that conclusion is that the plaintiff must be entitled to succeed in the action, for I have already disposed of the only possible alternative submission on the defendants' side. I, therefore, come to the conclusion that the judgment of Fenwick J. ought to be set aside and that there should be judgment for the plaintiff for the agreed sum of £71 10s. which is claimed by him.

Birkett L.J. I am entirely of the same opinion. There are two main questions to be determined. The first is whether the court is satisfied that there was, on all the facts and documents, a valid subsisting and enforceable apprenticeship agreement between the plaintiff and defendants. The second question is whether the plaintiff's conduct was of a character which justified the defendants in dismissing him summarily. I am of the same opinion as my Lord on both those questions. [His Lordship referred to the facts and continued:] It is plain from the evidence that the boy and his father executed the original apprenticeship document and that the name and address of the defendants at Cockermouth appeared on that document. It is abundantly plain, in my opinion, that though the defendants never executed the document in the full sense of that term, they must be taken, on the evidence, not only to have adopted it, but plainly to have acted on it and to have affirmed its existence in the documents which were sent to the Ministry of Labour. It was suggested in argument by Mr. Sellers that the defendant company had accepted no benefits under the document. I am perfectly clear that they had accepted benefits, and I do not think it can be reasonably contended that, in the circumstances of this case, there was not a valid, subsisting and enforceable apprenticeship agreement. Being of the opinion that, if that be so, the conduct of the apprentice in this case, however reprehensible it might be, does not reach that level which would permit the defendants summarily to determine the agreement, I am of opinion that this appeal ought to be allowed on the terms indicated by my Lord.

Romer L.J. I agree and have very little to add. The principle on which Mr. Thompson relied as supporting his first point when he opened his appeal before us is stated in Norton on Deeds, 2nd ed., p. 26, as follows: "Though execution of a deed is "necessary to bind the grantor, yet a party who takes the benefit "of a deed is bound by it though he does not execute it." The rule plainly has a very ancient origin, as can be seen by the references there to Littleton and to the Year Book of 8 Edward IV (in 1468). The author proceeds " and such non-executing "party can sue on covenants with him contained in the deed." It is true that no premium was paid in this case and that no money passed to the defendants, but it is equally plain that the defendants were entitled, from the moment that the apprentice and his father signed the document, to the benefit of the covenants by them contained in the document, and that must be regarded in the eye of the law as consideration for the corresponding obligations which the defendants themselves undertook. I can see no answer to that point on which Mr. Thompson relies, with this result, that the document, whether or not in fact executed by the defendants, is binding on them by reason of the fact that they took the benefit of its provisions. That being so, it is not necessary to express any concluded view as to whether or not in the circumstances of the case the defendants must be regarded as having entered into this written agreement. The Act of 1814 dispenses with the necessity of a deed, but there is authority (see for example *Kirkby* v. *Taylor* [5]) that, notwithstanding the rather general terms in which the Act is framed, an agreement in writing is necessary. I agree, however, with my Lord that there is much to be said on behalf of the plaintiff to the effect that the defendants should be treated as having entered into an agreement of apprenticeship in writing, having regard to the presence of the rubber stamp name and to the subsequent confirmation and assurance which they gave on the occasion of the application by the apprentice for deferment. I agree that the appeal should be allowed.

Appeal allowed; judgment for the plaintiff for £71 10s. 0d.*; plaintiff to have costs in the court below on scale* 3*; party and party costs in the Court of Appeal; the registrar to have discretion as to the solicitors' costs in the court below.*

Solicitors: *O. H. Parsons; Kenneth Brown, Baker, Baker, for Hayton, Simpson & Fisher, Cockermouth.*

E. D.

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[5] [1910] 1 K.B. 529.

C. A.

1953
July 1.

Singleton and
Morris L.JJ.

GRAFF BROTHERS ESTATES LD *v.* RIMROSE BROOK JOINT SEWERAGE BOARD AND OTHERS.

[1952 G. No. 827.]

Practice—Pleading—Writ—Indorsement—Claim for wrongful withdrawal of support—Statement of claim—Alternative claim in trespass and in negligence—Whether new cause of action—Limitation Act, 1939 (2 *&* 3 *Geo.* 6, *c.* 21), *s.* 21 (1)—*R.S.C., Ord.* 2, *r.* 1; *Ord.* 3, *rr.* 1, 2, 3; *Ord.* 20, *r.* 4.

The plaintiffs, owners and occupiers of land and houses, issued a writ against the defendants, a sewerage board assumed to be acting under statutory authority, and a firm of contractors who carried out work on the board's instructions. The writ bore a general indorsement in regular form claiming damages for wrongfully taking away the support of the plaintiffs' land and houses. Later the statement of claim was delivered, but more than one year after the cause of action had accrued. By it the plaintiffs claimed damages for trespass, and alternatively, by paragraph 5, damages for negligence in failing to take proper precautions to prevent support being withdrawn from the land and buildings. The defendants issued a summons asking that the paragraph alleging negligence be struck out on the ground that it set up a new cause of action not indorsed on the writ, and that such new cause of action was barred, at the time when the statement of claim was delivered, by section 21 of the Limitation Act, 1939:—

Held, that the general indorsement properly stated the nature of the plaintiffs' claim and was wide enough to cover not only the alternative claim in negligence but also trespass, nuisance, or withdrawal of support simpliciter; that, accordingly, the claim in negligence did not constitute a new cause of action; and that the pleadings as delivered could stand.

Order of Barry J. reversed.

Marshall v. *London Passenger Transport Board* [1936] 3 All E.R. 83 distinguished.

INTERLOCUTORY APPEAL from Barry J.

On March 5, 1952, the plaintiffs, Graff Brothers Ld., owners and occupiers of certain land and houses in Litherland, Lancashire, issued a writ against the defendants, the Rimrose Brook Joint Sewerage Board, a body engaged in the construction of sewerage works on and in land adjoining the plaintiffs' property, and the Norwest Construction Co. Ld., which carried out the work on the board's instructions. The writ was indorsed as follows: "The plaintiffs' claim is for damages for wrongfully "taking away the support of the plaintiffs' land and houses."

The statement of claim in the action was not delivered until

April 20, 1953. By paragraphs 3 and 4 the plaintiffs claimed that during March, April and May, 1951, the defendants had entered on their land by driving tunnels through and pumping water from it, and had thereby withdrawn support from the land and buildings, and that the entry and pumping constituted a trespass. Paragraph 5 was as follows: "Alternatively the "defendants were negligent in failing to take any or any "sufficient precautions to prevent support being withdrawn from "the said land and buildings of the plaintiffs by the said tunnels "and the said pumping of water from the said land."

After giving particulars of the damage, it was stated that though the subsidence which caused the damage had been checked, the plaintiffs contended that its operation was continuing and that damage to certain of the houses would inevitably occur; and they claimed damages against both defendants.

Instead of delivering a defence, the defendants issued a summons on May 11, 1953, asking for an order that the fifth paragraph of the plaintiffs' statement of claim be struck out on the ground that it set up a cause of action which was not indorsed on the writ of summons and which was barred by section 21 of the Limitation Act, 1939,[1] at the time of the delivery of the statement of claim. An order in those terms was made by Mr. District Registrar Bryson at the Liverpool District Registry on May 27, 1953, and that order was upheld by Barry J. sitting in chambers on June 12, 1953. Neither the local Act of Parliament on which the defendants were assumed to rely, nor any further particulars of the claim of negligence other than those set out in the statement of claim, were before the court.

The plaintiffs appealed, asking that paragraph 5 should stand as pleaded.

R. F. Levy Q.C. and *E. D. Sutcliffe* for the plaintiffs. The defendants in taking out the summons argued that the claim in negligence in paragraph 5 set up a new cause of action more than

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[1] Limitation Act, 1939, s. 21 (1): "No action shall be brought against "any person for any act done in pursuance, or execution, or intended "execution of any Act of Parliament, "or of any public duty or authority, "or in respect of any neglect or "default in the execution of any such "Act, duty or authority, unless it is "commenced before the expiration of "one year from the date on which "the cause of action accrued: Provided that where the act, neglect "or default is a continuing one, no "cause of action in respect thereof "shall be deemed to have accrued, "for the purposes of this subsection, "until the act, neglect or default has "ceased."

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a year after the cause of action accrued, and as this was an action against a public authority, the pleading, if allowed to stand, would embarrass them by defeating a possible defence based on section 21 of the Limitation Act, 1939. The whole issue is thus whether paragraph 5 introduced a new cause of action, or whether the words of the indorsement on the writ, which was issued in time, are wide enough to cover the claim in negligence. No defence was delivered, and the plaintiffs have not seen the local Act of Parliament on which the defendants rely, so that the court must assume that the board is a public authority protected by section 21 of the Act of 1939. It is not known whether that protection extends to the second defendants, the contractors.

The defendants say that the indorsement on the writ does not cover a claim in negligence, but only in nuisance, so that the claim in negligence goes outside the bounds of the indorsement. It is submitted that that is fallacious. The claim is not in nuisance against a neighbouring owner for violation of an easement, but against a person who would be a trespasser but for the Act of Parliament under which such trespass is authorized. The writ satisfies the requirements of the Rules of the Supreme Court: see Ord. 2, r. 1,[2] which requires that every writ shall be indorsed with a statement of the nature of the claim made, and Ord. 3, rr. 1, 2 and 3,[2] as to the form of indorsement. [Reference was also made to the indorsements in Appendix A to the Annual Practice, 1953, at pp. 2538–9, for "support" (which is in the identical words here used), "trespass to land," "negligence," and "nuisance."] When those forms of indorsement were settled and given the statutory authority of the Rules, it could not have been intended that the particular indorsement under the heading "support" was to be limited only to nuisance, because there are separate headings for nuisance, trespass, and negligence. It follows by implication from the fact that there is an independent heading for "support" that the indorsement covers any of the other three forms of action, and the words of the writ are wide enough to cover claims in nuisance, negligence, or trespass. In *Hill* v. *Luton Corporation*[3] though an indorsement was bad, it was said by Devlin J. to be effective to begin the action. The present indorsement does not show any great particularity, but it is wide enough to cover negligence.

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[2] R.S.C., Ord. 2, r. 1: "Every "action in the High Court shall be "commenced by a writ of summons, "which shall be indorsed with a "statement of the nature of the claim "made, or of the relief or remedy "required in the action. . . ."

Ord. 3, r. 1: "The indorsement of "claim shall be made on every writ "of summons before it is issued."

R. 2: "In the indorsement required "by Order II, Rule 1, it shall not "be essential to set forth the precise "ground of complaint, or the precise "remedy or relief to which the plaintiff considers himself entitled."

R. 3: "The indorsement of claim "shall be to the effect of such of the "Forms in Appendix A, Part III, as "shall be applicable to the case, or, "if none be found applicable, then "such other similarly concise form as "the nature of the case may require."

[SINGLETON L.J. By what right can there be included in the statement of claim any claim wider than that in the writ?]

If by "wider" is meant a new cause of action, the plaintiffs have no such right without amendment of the writ, and on the authorities this court would refuse to allow the plaintiffs to add a new cause of action against a public authority outside the period laid down by section 21 of the Limitation Act, 1939, though if the plaintiffs had sought to amend, the second defendants would have had to show that the Act applied equally to protect them.

Viscount Hailsham Q.C. and *B. L. A. O'Malley* for the defendants. In *Marshall* v. *London Passenger Transport Board*[4] this court decided that where an attempt was made to plead a new cause of action under the guise of an old one, that would not be allowed. That is why the plaintiffs here have eschewed the course of seeking to amend the writ, for in *Marshall's* case[4] the court showed its determination to protect public authorities, and this court, it is submitted, would on that authority have refused in the present case to allow an amendment.

The writ here is defective for want of particularity: see *per* Devlin J. in *Hill* v. *Luton Corporation*[5] warning parties of the danger of such defects.

[SINGLETON L.J. It cannot be said that this indorsement is defective when the precise words were taken from p. 2538 of the Annual Practice.]

Those words are a perfectly good indorsement, representing a well-ascertained and well-recognized cause of action, but they have nothing whatever to do with an action for negligence.

[SINGLETON L.J. Is the word "wrongfully" part of the necessary indorsement in an action for withdrawal of support?]

It was always included in the old forms of pleading: see Bullen & Leake: Precedents of Pleadings (3rd ed., pp. 406–7). The action for withdrawal of support is an action by a proprietor of land for violation of one of his proprietary rights. Negligence is an action for breach of the duty to take care: see Clerk & Lindsell on Torts (10th ed., p. 565) showing that it is a tort as such.

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[3] [1951] 2 K.B. 387, 391; [1951] 1 T.L.R. 853; [1951] 1 All E.R. 1028.

[4] [1936] 3 All E.R. 83.

[5] [1951] 2 K.B. 387, 390.

[Singleton L.J. But if a prudent man who takes away support from his neighbour's land would take steps to provide support for that which he takes away, surely anyone who did not take such steps would be liable in negligence? Why should not the one cause of action cover the other?]

They are two quite separate causes of action. The fallacy lies in saying that because the damage is the same, the different causes of action can be covered by the same writ.

[Singleton L.J. The plaintiffs have issued their writ in time and have stated "the nature of their complaint." Is it to be said that because they did not use the word "negligence" until time had run, they can never be heard to say that what the board and their contractors did under their land was in fact negligently done?]

Not without amending the indorsement on the writ; and the plaintiffs concede that if paragraph 5 pleads a new cause of action, the court will refuse to allow an amendment which would deprive their opponents of the protection of section 21 of the Limitation Act, 1939. Here, however, the plaintiffs say that they do not need to amend at all; but if they have chosen to use words in the indorsement which are appropriate to the protection of a proprietary right, they cannot under cover of supplying particulars to that writ in a statement of claim invoke the court's powers under Ord. 20, r. 4, and introduce what is in substance an amendment to the writ and a new cause of action. The plaintiffs are attempting to add a count in negligence when they have only pleaded nuisance. It is important to bear in mind that where a public authority is authorized by statute to commit trespass or nuisance, and provides for compensation, there is no cause of action at all against the public authority.

[Singleton L.J. That may be. But we know nothing about the Act.]

It would be relevant only if the plaintiffs could get an amendment to the writ; so long as they do not seek that, the difference between the two defendants is purely contingent.

[Morris L.J. Might the consideration that the first defendants are a public authority entitled to act under statutory powers lead to the view that they were only doing something wrongful if they were negligent? "Wrongful withdrawal" of support may be a comprehensive notion which must involve negligence: see Salmond on Torts (11th ed., p. 284) on "wilful or negligent "action."]

The basis of withdrawal of support as an action does not depend on intention or negligence but on the protection of a proprietary right. It would be very serious to mix up this action with any other form of action.

[SINGLETON L.J. But Mr. Levy said that the defendants contended that it covered nuisance and nothing else.]

Only in the sense that if the action for support is traced back to the old causes of action it is found that the particular tort could be, and often was, brought either in nuisance or in trespass; so technically it would be right to say that it covers a particular type of nuisance. But on their writ they are only entitled to allege withdrawal of support.

[MORRIS L.J. Why did not the defendants apply to strike out the claim in trespass as well?]

It may be that they were too modest. They would be prejudiced if they lose this appeal because they would then have to frame a defence which they desire to found on section 21 of the Act of 1939, *i.e.*, that the action for negligence was not started within the space of one year. If the pleading stands, the answer to that defence would be that the action *was* begun within the year, because the only way of beginning an action is by writ. Thus the defendants could raise the Act only by way of interlocutory application to have the pleading struck out, or by an objection in point of law under Ord. 25, r. 2. It is not enough to say that the indorsement on the writ is so bad that it will cover almost anything in the statement of claim. It must be read reasonably, and what this indorsement complains of is wrongful withdrawal of support and not the wrongful failure to take proper precautions.

Levy Q.C. replied.

SINGLETON L.J. read the indorsement on the writ and the relevant paragraphs of the statement of claim, and continued: I should like to say that there is surprisingly little material before this court. The plaintiffs, in paragraph 2 of the statement of claim, say that the first defendants are a statutory body constituted to carry out a drainage scheme. We have not seen the statute under which they were constituted or under which they were acting. Mr. Levy, who appears for the plaintiffs, told us that he had not seen it, and that he knows nothing about it.

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Nor do we know anything more of the facts than that which is set out in the plaintiffs' statement of claim in respect of which the defendants' solicitors on behalf of both defendants issued a summons dated May 11, 1953, which asked for an order "that "the fifth paragraph of the plaintiffs' statement of claim be "struck out on the ground that the same sets up a cause of "action which is not indorsed on the writ of summons and which "was barred by section 21 of the Limitation Act, 1939, at the "time of the delivery of the statement of claim; that the "defendants pay the costs," etc.

If paragraph 5 did set up a new cause of action, it appears to to be clear that that cause of action was barred by section 21 of the Limitation Act, 1939. I say "it appears to be clear" merely from the dates with which we have been supplied.

[His Lordship read section 21 (1) of the Limitation Act, 1939, and continued:] We have had no argument on that section as applicable to the facts of this case; nor has there been consideration given, so far as I can see, to the fact that there are two defendants, one a statutory body, and the other contractors acting, it may be, under contract with them.

The real question with which we are faced is as to whether or not the indorsement on the writ is sufficiently wide to embrace, or to cover, paragraph 5 of the statement of claim. In the Annual Practice (1953 ed.) there are set out forms for the indorsement of writs, and I refer to some of them which are to be found at pp. 2538 and 2539. One is negligence; another is trespass to land; another is support; another is nuisance.

When this appeal was opened to the court, Mr. Levy, for the plaintiffs, said that the defendants' contention was that the indorsement on the writ covered nuisance and nothing else. The paragraph of the statement of claim which the defendants applied to strike out was the paragraph which sets up as an alternative, a claim for negligence.

This led Morris L.J. to ask, in the course of the argument, of Lord Hailsham: "Why did you not apply to strike out the claim "for trespass?" His reply was that at least he had been modest.

The indorsement on the writ is precisely in the form set out on p. 2538 of the Annual Practice (1953 ed.) under "support," which is in these words: "The plaintiff's claim is for damages "for wrongfully taking away the support of the plaintiff's land "[or house or mine]."

It is not very clear what is the true category of an action in which damages are claimed for loss of support. The subject is considered in the current edition (11th ed.) of Salmond on Torts, at p. 284, in a chapter which is headed "Nuisance," and it would seem that it is treated by the author as a private nuisance which gives rise to an action for a civil wrong. The passage on p. 284 states: "It is an actionable wrong to withdraw the "support to which land or buildings are entitled, and thereby "wilfully or negligently to cause a subsidence of the land or "structural injury to the buildings. No action for damages lies "until and unless actual subsidence or other damage has "occurred. The wrong consists not in withdrawing the support "which the dominant tenement is receiving, but in doing damage by means of such a withdrawal."

R.S.C. Ord. 2, r. 1, provides: "Every action in the High "Court shall be commenced by a writ of summons, which shall "be indorsed with a statement of the nature of the claim made, "or of the relief or remedy required in the action, and which "shall specify the Division of the High Court to which it is "intended that the action should be assigned."

The first requirement of that rule is that the writ of summons should be indorsed with a statement of the nature of the claim made. It appears to me that the writ as indorsed does state the nature of the claim made; the writ is regular; no objection can be taken to the indorsement on the writ.

Order 3, r. 2, provides: "In the indorsement required by "Ord. 2, r. 1, it shall not be essential to set forth the precise "ground of complaint, or the precise remedy or relief to which "the plaintiff considers himself entitled." It seems clear that the indorsement in this case is within the two rules to which I have referred. The claim is for damages for wrongfully taking away the support of the plaintiffs' land and houses.

The forms in the Annual Practice to which I referred appear to give substance for the submission that in a case in which the plaintiff has been deprived of support to his land, there may be a claim for damages for taking away support; or a claim for damages for nuisance; or for negligence; or for trespass. If subsidence which affects a block of houses belonging to the plaintiff takes place, and all that the plaintiff knows is that the defendants are working under those houses, it is difficult for him to say precisely what his cause of action may be. He may, and probably will, know much more about it on discovery. But if he indorses his writ in the way in which the writ is indorsed in this case, he clearly is stating the nature of the claim made, and he is not required to set forth the precise grounds of complaint.

Having indorsed and served his writ, a plaintiff is faced with the necessity of delivering a statement of claim. The plaintiffs in paragraph 3 set out the facts on which they relied. In paragraph 4 they allege that those facts amounted to a trespass. In paragraph 5 they plead that alternatively the defendants were negligent in that they failed to take any or any sufficient precautions to prevent support being withdrawn.

It is said by Lord Hailsham on behalf of the defendants that paragraph 5 sets up an entirely new cause of action, and if it does, it is something which cannot be allowed.

R.S.C., Ord. 20, r. 4, provides: "Whenever a statement of "claim is delivered the plaintiff may therein alter, modify, or "extend his claim without any amendment of the indorsement "of the writ." In the notes under that Order appears this: "In "a general indorsement it is 'not essential to set forth the "'precise ground of complaint, or the precise remedy or relief "'to which the plaintiff considers himself entitled.' (Ord. 3, "r. 2.) Hence the plaintiff is permitted in his subsequent statement of claim, to alter, modify, or extend his original claim to "any extent, and to claim further or other relief, without "amending his writ, . . . provided he does not completely change "the cause of action indorsed on the writ without amending the "latter."

Lord Hailsham pointed out that there had been no application to amend the writ, and he said that any application that was made would undoubtedly be refused because of the position in which the defendants would be placed in regard to section 21 of the Limitation Act, 1939.

In my opinion paragraph 5 ought not to be regarded as the setting up of an entirely new cause of action. I like to see simplicity of pleading as far as possible. By the writ in this case the plaintiffs showed the nature of their complaint. In the statement of claim they set out in different ways the nature of the remedy or remedies which they seek, having regard to the facts pleaded. I do not think that it is setting up a new cause of action when plaintiffs having indorsed the writ in this way, say: "Alternatively, if you did this and did not give "support in place of that support which you have taken away, "you were guilty of negligence."

I think that the plaintiffs were entitled so to plead in their statement of claim and that it does not amount to changing completely the cause of action indorsed on the writ. I look at it in this way: the plaintiffs know little of what has happened under the ground, except that damage has been caused. If they had not pleaded paragraph 5 of the statement of claim, and if the defendants had delivered a defence, it may be that the defendants would have pleaded that they did that which they did under their statutory powers. It seems to me that if that had been a plea put forward by the defendants, it would have been open to the plaintiffs to plead by way of reply: "In exercising "your statutory powers you failed to take the precautions which "a reasonable person or body should have taken."

Lord Hailsham submitted that the plaintiffs would not be able to plead that by way of reply, as it would be setting up a new cause of action, and that they could not do that without amending their writ, and it was too late for that. I do not agree. I think that the plaintiffs would have been entitled so to plead by way of reply as an answer to that which the defendants put forward as their defence, assuming that they had put it forward. If they could do that it really comes to this, that in their statement of claim they are setting out something which is no embarrassment to the defendants and which they are entitled to plead under this general indorsement; in other words, the plaintiffs have indorsed their writ generally according to the rules. As indorsed it appears to me to be sufficient to cover any one of the four specimen grounds, if I may so describe them, which have been mentioned: nuisance, negligence, trespass and withdrawal of support. The plaintiffs ought not to be shut out from alleging that which they allege as an alternative in paragraph 5 of the statement of claim.

We have been referred to certain authorities which do not seem to me to help greatly towards the solution of this question. I recognize that it has been said in the courts time and again that the plaintiff is not to be allowed to set up a new cause of action if the period provided by the Limitation Act has run. But this is not a new cause of action. The facts are set out in the statement of claim. That part of the statement of claim is unobjectionable. So too I think is the alternative way of pleading on those facts.

For those reasons I would allow this appeal, and would order that the summons of the defendants of May 11, 1953, should stand dismissed.

MORRIS L.J. I am entirely of the same opinion and agree fully with the judgment which my Lord has just delivered. What the plaintiffs did was fully warranted by the provisions of R.S.C. Ord. 3, r. 2, and Ord. 20, r. 4, to which my Lord has referred.

Paragraph 5 of the statement of claim does not in my judgment introduce a new cause of action or a new case.

The position here is entirely different from the position in *Marshall* v. *London Passenger Transport Board.*[1] In that case the plaintiff was injured in a collision between his bicycle and a tramcar, and he issued a writ claiming damages for personal injuries and consequential loss sustained by reason of the negligence of the defendants, their servants or agents. Then, at a later date, the plaintiff sought leave to amend his particulars by setting up a case of neglect to keep the tram track and highway in repair, describing that neglect as a breach of statutory duty. It was held that that was something that he could not do. Lord Wright M.R., in the course of his judgment said[2]: "The claim "originally indorsed on the writ was for damages for personal "injuries caused by the negligent driving of the defendants' "servant—that is, a claim based on negligence in driving and "negligence of a vicarious character; it proceeds on the liability "of the defendants for their servant's default. The amendment "which is proposed is based upon what I regard as something "entirely different, not as a claim for negligent driving and not "as a claim for breach of duty by the defendants' servant for "which the defendants are liable; it is based on a claim for "breach of statutory duty that may indeed be regarded as "statutory negligence, as explained in the recent case of "*Lochgelly Iron and Coal Co., Ld.* v. *M'Mullan,*[3] but it is "certainly an entirely different claim from a claim for negligent "driving, and it is a claim which is not based on vicarious "liability. It is a claim for breach of a statutory duty, which is "a liability personal to the corporation and not capable of being "delegated; but in addition to that it involves, as I read the "proposed amendment, a quite different set of ideas, quite a "different allegation of fact."

Here, in my judgment, paragraph 5 of the statement of claim does not embark on any quite different set of ideas or on quite a different allegation of fact. In a sense paragraph 5 might be regarded as a new explanation or a new allegation as to how the wrongful taking away of support may have come about, but it is the same complaint as is denoted by the indorsement on the writ. By "complaint," of course, I am not referring to damage, but to cause of action. In my judgment, there was here in paragraph 5 no allegation of a new cause of action; there was nothing in the nature of a new case set up. Paragraph 5 is all within the umbrella raised by the indorsement of the writ. I therefore concur in the judgment which my Lord has delivered.

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[1] [1936] 3 All E.R. 83.

[2] Ibid. 88.

[3] [1934] A.C. 1; 49 T.L.R. 566.

Appeal allowed.

Solicitors: *J. Tickle & Co. for Owen, Dawson & Wynn-Evans, Liverpool; Berrymans for Barrell & Co., Liverpool.*

M. M. H.

J. D'ALMEIDA ARAUJO LDA. *v.* SIR FREDERICK BECKER & CO. LD.

1953
May 5, 6, 7, 8, 11, 12.

Pilcher J.

[1948 J. 1083.]

International Law—Contract—Damages—Remoteness—Law applicable.

In an action for damages for breach of a contract governed by foreign law, questions of remoteness of damage are governed by the proper law of the contract, whereas the quantification of damage, which according to the proper law is not too remote, is governed by the lex fori.

The plaintiffs entered into a contract, the proper law of which was Portuguese, to sell 500 tons of palm-oil to the defendants. As a result of a breach by the defendants, the plaintiffs committed a breach of a contract with a third party for which they were liable to pay the third party an indemnity. In an action by the plaintiffs for damages for breach of contract, the question whether the plaintiffs were entitled to recover the indemnity from the defendants as a head of damage was a question of remoteness of damage to be decided according to Portuguese law.

Livesley v. *Horst* [1924] S.C.R.(Can.) 605 considered.

ACTION.

The plaintiffs, a firm of merchants carrying on business in Lisbon, agreed to sell to the defendants, a British company carrying on business as merchants in the City of London, 500 tons of palm-oil at 14.20 escudos a kilogram f.o.b. Angola, Portuguese West Africa, payment to be by open credit. Following correspondence between the parties, the defendants, on March 20, 1947, cabled the plaintiffs: "Accept 500 tons palm-oil. Await

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[Reported by Miss C. J. ELLIS, Barrister-at-Law.]

"instructions credit." On March 21 the plaintiffs cabled the defendants: "We beg you open credit irrecoverable divisible and "transferable immediately Banco de Angola in Lisbon. . . . "Credit must be open by the 24th current month."

On March 20, the plaintiffs had concluded a contract with one Gustavo Osio Mourao for the purchase of 500 tons of palm-oil which was designed to implement the plaintiffs' contract with the defendants. The contract provided that payment should be "by credit opened at the Bank of Angola in Lisbon, irrecoverable, divisible and transferable, in favour of the seller, Gustavo "Osio Mourao, this credit to be opened by the 24th instant." The contract also contained the following clause: "If either of "the contractors, seller or purchaser, should fail to fulfil this "contract, the one who has failed shall pay to the other, as "indemnity for the damages, the amount corresponding to five "per cent. of the total value of the contract." Mourao, it appeared, had entered into a similar contract with one Guimeraes, through the latter's agent in Lisbon, for the purchase of the oil.

The defendants had agreed to re-sell the palm-oil, payment for which was to be made by credit in their favour in Lisbon, but the sub-purchasers had failed to open the credit, with the result that the defendants were unable to open the credit in favour of the plaintiffs. The plaintiffs were ready to complete the sale, if the defendants opened the credit, at least up to April 12. On April 14, the plaintiffs advertised the palm-oil for sale in a Lisbon paper, *Diaro de Noticias*, against immediate opening credit, but were unable to sell it. On April 18 Guimeraes cabled that if the credit was not opened on that day his contract would be cancelled.

The defendants, having failed to open the credit in the plaintiffs' favour, the plaintiffs were unable to open the credit in Mourao's favour, and accordingly under their contract with him were bound to pay him the indemnity, which amounted to the equivalent of £3,500, and they did so pay him.

The plaintiffs claimed damages for the defendants' breach of contract under two heads, (1) £1,000 for the loss of profit which they would have made on the sale; and (2) £3,500 which they had had to pay Mourao for breach of their contract with him.

A. A. Mocatta Q.C. and *J. M. Shaw* for the plaintiffs argued on the facts.

H. J. Phillimore Q.C. and *L. G. Scarman* for the defendants. The distinction between the establishment of a right in contract and the enforcement of a remedy is that the former is governed by the lex loci contractus whereas the latter is governed by the lex fori. The forum will not give any better or different remedy to the parties whether the contract is governed by a foreign law or by the lex fori: *De La Vega* v. *Vianna.*[1] For an action in tort to lie in this country the act complained of must be wrongful in the foreign country where it was committed and must also be actionable in this country: *Machado* v. *Fontes*[2]; *Kohnke* v. *Karger.*[3] The distinction made in Cheshire's Private International Law, 4th ed., p. 659, between remoteness of damage and measure of damages is correct, but the question whether the penalty paid to Mourao is recoverable from the defendants is a question of measure of damages and not remoteness of damage and accordingly is governed by the lex fori. The defendants could not have foreseen that the plaintiffs would have been under an obligation to indemnify Mourao and therefore, according to English law, the £3,500 paid to him was too remote and cannot be recovered from the defendants. The plaintiffs, if they allege that they were compelled to make this payment, must satisfy the court that it was within the contemplation of the parties.

If the question is to be decided according to Portuguese law, then the Portuguese lawyers are in substance agreed that the plaintiffs can recover the money paid to Mourao only if they can prove that they had no other way out without added risk to themselves than to pay the money claimed and forgo their profit. [Reference was also made to *Fergusson* v. *Fyffe*[4]; *Boguslawski* v. *Gdynia-Ameryka Linie*[5]; *Livesley* v. *Horst*[6]; *Madeleine Vionnet et Cie* v. *Wills.*[7]]

Mocatta in reply. The law applicable to damages raises an interesting point. The real distinction is between substantive law and procedure, but the difficulty arises in defining what is meant by either. A remedy is part of the substantive law according to *Livesley* v. *Horst.*[8] Article 707 of the Portuguese Commercial Code, which provides that "only damages necessarily resulting from the breach of contract may be taken into account for damages," is as much part of the substantive law of Portugal as remedial damages were part of the substantive law of California in that case.

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[1] (1830) 1 B. & Ad. 284.

[2] [1897] 2 Q.B. 231; 13 T.L.R. 407.

[3] [1951] 2 K.B. 670; [1951] 2 T.L.R. 40; [1951] 2 All E.R. 179.

[4] (1841) 8 Cl. & F. 121.

[5] [1951] 1 K.B. 162; [1951] 2 All E.R. 113.

[6] [1924] S.C.R. 605.

[7] [1940] 1 K.B. 72; 56 T.L.R. 15; [1939] 4 All E.R. 136.

[8] [1924] S.C.R. 605.

1953

J. D'Almeida Araujo Lda. v. Sir Frederick Becker & Co. Ld.

When a contract is entered into a civil or legal right is generated by the contract to be compensated by the proper law for the loss that may be sustained for breach of it. One law may say that the loss is too remote, another that it is not. The proper law of the present contract is that of a foreign country. On the evidence here the plaintiffs can recover the penalty. If the damages were governed by English law they could only recover nominal damages subject to the principle in *Trans Trust S. P. R. L.* v. *Danubian Trading Co. Ld.*[9]

[Pilcher J. The difference is important merely on the question of foreseeability?]

The reason for Cheshire's remark is that the foreign law quantifies the loss and questions of procedure do not arise until the court considers giving judgment. For example, the monetary relief that an English court can give is limited to sterling, *Madeleine Vionnet et Cie* v. *Wills*,[10] but the loss is ascertained according to the proper law of the contract; it is only when the loss is translated into sterling that the procedural law applies. Cheshire's distinction between remoteness of damage and measure of damages is correct. Cases in tort are no guide to the legal position in contract, which is very different. In tort, apart from the fact that there is no consensual basis, it is not sufficient to prove that an act is unjustifiable overseas, it must also be proved that it is actionable here as well. In contract it is not necessary to show that it would be actionable here. *Trans Trust S. P. R. L.* v. *Danubian Trading Co. Ld.*[11] is singularly parallel to this case and reliance is placed on the judgment of Denning L.J. in that case on the question of measure of damages.

Pilcher J. stated the facts and continued: I am quite satisfied that a concluded contract was arrived at between the plaintiffs and the defendants for the sale and purchase of this parcel of palm-oil, either when the defendants, on March 20, sent their cable of acceptance, or at the latest, when, on March 21, the plaintiffs sent their cable of that date giving instructions, amongst other things, as to the opening of credit.

[His Lordship then said that he had no doubt that in all the circumstances the defendants were in breach of their contract to open the credit provided for by their contract within a reasonable time, and that the only point which remained was what damages, if any, were the plaintiffs, in the circumstances, entitled to recover? He continued:] While it was common ground between the parties that the substantive contract between them was governed by Portuguese law, the plaintiffs contended that the damages which they were entitled to recover in the particular circumstances of the case were also to be determined in accordance with the principles of Portuguese law. The defendants, on the contrary, submitted that even in a case where the substantive contract was governed by foreign law, procedural or remedial questions, which included the question of damages, ought to be determined according to the lex fori, in this case, the law of England. Subject to the question of the obligation of an innocent party to mitigate the damages, to which I will refer in a moment, the question of the proper law to be applied in regard to the damages in this case has importance, because the plaintiffs are seeking to recover from the defendants the £3,500 as one head of damage—that being, of course, the sum which they had to pay to Mourao for failing to carry out their contract with him.

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[9] [1952] 2 Q.B. 297; [1952] 1 T.L.R. 1066.

[10] [1940] 1 K.B. 72.

[11] [1952] 2 Q.B. 297, 305.

The loss sustained by the plaintiffs in paying that sum was clearly not a loss which was foreseeable by the defendants at the time when they negotiated this contract with the plaintiffs, and it is clear that under English law this sum of £3,500 would be irrecoverable by the plaintiffs from the defendants. It was argued by Mr. Mocatta, on behalf of the plaintiffs, that they would, under Portuguese law, have been entitled to include this sum in their damages if damages were assessed on the principles of Portuguese law. While I feel no certainty that the plaintiffs' right to recover damages in this case will turn out in the end to be any different whether the principles of English or Portuguese law are applied, it is none the less desirable that I should state my view on the point.

I was referred to a number of textbooks on the particular point whether in a foreign contract which has to be determined by the lex loci contractus the issue of damages is, in the words of some of the textbook writers, "a procedural or remedial "matter" such as falls to be determined in accordance with the lex fori, or whether, on the other hand, it is part of the substantive contract between the parties and so to be determined in accordance with the lex loci contractus. I propose to read certain passages from the textbooks, because there is very little authority on this particular topic in English law. In Dicey's Conflict of Laws, 6th ed., pp. 649–50, this passage occurs: "A further difficulty is created by the problem of how to distinguish between "the effect of the contract and the remedies which are available "for its enforcement. Whether a contract gives rise to a claim "for performance or to a claim for damages, whether, in the "event of a breach of contract, the other party has a right to "rescind it, whether interest is payable on a debt—all these are "matters which, on a proper analysis, should be regarded as "affecting the rights and obligations to which the contract gives "rise. While it is clear that, in the view of the English courts, "the liability to pay contractual interest and the rate of such "interest are determined by the proper law, it appears to be a "generally accepted view that the measure of damages is, in an "English court, governed by English law, whatever be the "proper law of the contract. This principle is apt to deprive a "party of rights he would have enjoyed under the proper law or "to confer upon him an uncovenanted benefit merely owing to "the fact that he happened to be able to invoke the jurisdiction "of an English court. Its rigour could be mitigated if, following "Cheshire's suggestion, the courts could separate from the "question of the measure of damages that known as the "'remoteness of damage' and hold that it was one of the effects "of a contract to determine what events may and must be taken "into account in assessing the damages for which a party is "liable."

On p. 862, under the head "Procedure, Rule 193," the following passage occurs: "While there is little authority, it "appears that English courts, contrary to the prevailing "American practice, tend to hold that damages are a matter of "procedure in an action based on a foreign tort. In contract, "there is no direct English authority, but it is submitted that "questions of remoteness of damage should be determined by "the proper law of the contract, and should not be treated as a "matter of procedure," and a reference is then given to a case decided in the Supreme Court of Canada, *Livesley* v. *Horst*,[1] to which I will refer. "The rate of interest to be allowed (if any) "for breach of a foreign contract must depend on its proper "law." Those are the relevant passages in Dicey.

There are also certain passages in Cheshire's Private International Law, 4th ed., to which I must refer. After considering the principles on which damages are recoverable in this country in actions founded respectively in contract and tort, the author states at pp. 659–60: "The truth would appear to be that judicial "pronouncements and the statements in text-books are unintelligible unless two entirely different questions are segregated. In "brief, remoteness of liability or remoteness of damage must be "distinguished from measure of damages. The rules relating to "remoteness indicate what kind of loss actually resulting from "the commission of a tort or from a breach of contract is "actionable; the rules for the measure of damages show the "method by which compensation for an actionable loss is "calculated. Damage may be, but damages can never be, "too remote. In tort the rule of remoteness established by the "*Polemis* case [2] is that a tortfeasor is responsible for all the "direct consequences of his wrongful act, even though they "could not reasonably have been anticipated. The analogous "rule in contracts, however, is different. The breach of a con-"tract, like the commission of a tort, causes material loss, and it "is that loss to which the rule in *Hadley* v. *Baxendale* [3] applies. "In other words, it is impossible to claim monetary compensa-"tion in respect even of an admitted loss unless it arose "naturally and in the ordinary course of things from the breach "of contract. But the rule that regulates the measure of "damages is the same for contracts as it is for torts. It requires "restitutio in integrum. In torts compensation must be paid "for the whole of the direct loss; in contracts, as *Robinson* v. "*Harman* [4] insists, compensation must be paid for the whole of "the natural or foreseeable loss.

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[1] [1924] S.C.R. 605.

"Alive to the distinction between remoteness of liability and "measure of damages we can now attempt to state the relevant "principles of private international law.

"There can be no doubt, at least on principle, that remote-"ness of liability must be governed by the proper law of the "obligation that rests upon the defendant. Not only the "existence, but also the extent, of an obligation, whether it "springs from a breach of contract or the commission of a "wrong, must be determined by the system of law from which "it derives its source. The proper law admittedly determines "the nature and content of the right created by a contract, and "it is clear that the kind of loss for which damages are recover-"able upon breach forms part of that content. Both the nature "and the content of a contractual right depend in part upon the

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[2] [1921] 3 K.B. 560; 37 T.L.R. 940.

[3] (1854) 9 Ex. 341.

[4] (1848) 1 Ex. 850.

"question whether certain consequential loss that may ensue if "the contract is unperformed will be too remote in the eye of "the law. If the proper law determines what constitutes a "breach, it is also entitled to determine the consequences of a "breach."

That passage from Professor Cheshire's book seems to me to be very closely reasoned and to offer considerable help in deciding this problem, which is not an easy one. The conclusion at which he arrives would seem to be that questions of remoteness of damage should be governed by the proper law of the contract, whereas the quantification of damage, which according to the proper law is not too remote, should be governed by the lex fori.

I must also refer to *Livesley* v. *Horst*,[5] the headnote of which reads: "The right to damages for breach of a contract made "in a foreign country and to be executed there is governed by "the lex loci contractus and not by the lex fori." The case, which concerned the sale of hops, was an appeal from a decision of the Court of Appeal for British Columbia affirming the judgment of the trial judge. The contract was one which in its substance was governed by Californian law, and the only material issue, from the point of view of the present case, with which the Supreme Court of Canada was concerned was whether or not the measure of damages was also governed by the law of California. The judgment of the court was delivered by Duff J., who said[6]: "The only question requiring discussion is the question "raised by the appellant's contention that, as to the measure of "damages, the rights of the plaintiff are governed by the law of "British Columbia, and not by the law of California. There is "not and, in view of the evidence there could not be, any serious "controversy, either as to the law of California or as to its "application to the facts. The expert witnesses are in agreement upon the point that, by virtue of the rules laid down in "the California code, the plaintiffs acquired, under each of the "contracts we are concerned with, a lien upon the subject-matter of the sale as soon as it was identified, for a sum "equivalent to the purchase price; that, accessory to this lien, "there is given by the same provisions a power of sale by "auction on default of payment; and that, if a sum equal to the "amount of the purchase money is not realized from the sale, "the vendor also becomes entitled to require from the purchaser

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[5] [1924] S.C.R. 605.

[6] Ibid. 606.

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" payment of the difference between the amount so realized and " the sum due to the vendor under the contract of sale. The " vendor is entitled to bid at the sale. And again there could be " no dispute, in view of what occurred at the trial, that each of " the sales by the plaintiff was a sale valid in California; or that " under the law and in the courts of that state the plaintiff if " entitled to recover at all would be entitled to the amounts " which have been awarded by the judgments appealed from.

" But damages are not exigible, the appellants argue, under " the terms of the contract itself, but under a new obligation, " which, with its accessory right of action, springs from the " breach of contract; and this right, being strictly remedial in its " nature, must on principle, it is said, be derived from and ruled " by the lex fori and not the proper law of the contract.

" There is singularly little express authority in English law " upon the broad question whether in an action on a foreign " contract—that is, a contract made abroad, and to be executed " abroad—the right to unliquidated damages for breach of it is " a right determined and measured by English law or by the " appropriate foreign law; although, as we shall presently see, " judicial dicta, the opinions of text-writers and the analogy of " decided cases, all appear to point to a conclusion in a sense " opposed to the contention of the appellants.

" In principle, it is difficult to discover a solid ground for " refusing to classify the right to damages for breach of contract " with other rights arising under the proper law of the contract, " and recognizable and enforceable as such. 'Where rights are " 'acquired under the laws of foreign States,' (said Turner L.J. " in *Hooper* v. *Gumm*[7]) 'the law of this country recognizes and " 'gives effect to those rights, unless it is contrary to the law " 'and policy of this country to do so.' The exception embraces " a very wide field, and among other things excludes procedure, " because the policy of the English law recognizes no vested " rights in procedure, and a party invoking the jurisdiction of " the courts must take procedure as he finds it. The concept " of procedure, too, is, in this connection, a comprehensive one, " including process and evidence, methods of execution, rules of " limitation affecting the remedy and the course of the court " with regard to the kind of relief that can be granted to a suitor. " But it does not, of course, extend to substantive rights; and " here questions as to substantive rights include all questions as

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[7] (1866) L.R. 2 Ch. 282, 289.

"to the 'nature and extent of the obligation' under the foreign "contract: *Fergusson* v. *Fyffe*,[8] *per* Cottenham L.C.

"It is most important to observe that it is not the foreign "agreement to which effect is given by English law but, as the "language of the accurate judge, whose judgment is quoted, "suggests, it is the civil or legal right generated by the "contract. The right of action, as Willes J. said in *Phillips* v. "*Eyre*,[9] is a 'creature' of the law by which the contract is "governed. Applying the principle to the circumstances of the "case before us, the lien given to the vendor, and the accessory "right of sale, are obviously substantive rights given by the "law of California to the vendor as such; in his capacity, that "is to say, as seller under a contract of sale. And the right to "recover the difference between the contract price and the "moneys realized on the sale would seem to be not less so."

The question which I have to determine here really depends, if I accept and adopt, as I do, the analysis given by Professor Cheshire, on whether the £3,500 which the plaintiffs have had to pay to Mourao is a head of damage which is recoverable or not on principles of remoteness of damage, or whether it is to be regarded as a mere established quantification of a part of the loss the plaintiffs have in fact sustained. While the decision in the Canadian case is not binding on me, and while the facts of that case can be distinguished from those of the present case, it is none the less a decision which I must, and do, treat with respect. I confess that in the absence of any direct authority I was attracted by the reasoning in the passage I have quoted from Professor Cheshire's work.

Fortified by the decision of the Supreme Court of Canada, I conclude that the question whether the plaintiffs are entitled to claim from the defendants the £3,500 which they have paid to Mourao, depends on whether such damage is or is not too remote. In my view, the question here is one of remoteness, and therefore falls to be determined in accordance with Portuguese law. Whether the plaintiffs are entitled to recover this sum under Portuguese law is, however, quite another matter. Article 707 of the Portuguese Commercial Code is in the following terms: "Only the damage necessarily resulting from the breach "of contract may be taken into account for damages."

The two Portuguese lawyers who were called on either side were agreed on a number of matters. They were agreed that it was unnecessary under Portuguese law in cases of breach of contract for the innocent party to show that the damages which he had sustained were damages which must have been in the contemplation of the defaulting party. They were, as I understood it, also in agreement that the words in the article, "necessarily resulting," limited the damages recoverable to such damages as flowed "directly, exclusively, immediately," and, I think, "unavoidably from the breach." Dr. Badia, called on behalf of the plaintiffs, expressed the view that in Portuguese law the £3,500 in question were damages which in the particular circumstances would be regarded as flowing in this fashion from the defendants' breach, whereas Dr. Azancot, called on behalf of the defendants, expressed the view that that would not be so regarded by the Portuguese courts. Dr. Azancot, in expressing his opinion was, I think, influenced by another consideration, namely, the duty under Portuguese law of the injured party to mitigate his damage.

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[8] 8 Cl. & F. 121, 140.

[9] (1870) L.R. 6 Q.B. 1, 28.

Dr. Azancot said: "If the plaintiffs only broke their contract "with Mourao because the defendants broke their contract with "the plaintiffs, and the plaintiffs had no other way out, it would "follow from the passages I have quoted"—and he quoted certain passages from recognized textbooks on Portuguese law— "that the plaintiffs are entitled to recover from the defendants "the sum they have paid to Mourao plus any other damage they "could prove." He also said: "If there is a market in which "goods can be bought, the rule with regard to damages resulting "from a breach of contract is the same as it is in England."

Both Portuguese lawyers agreed that the duty of an innocent party in a case of breach of contract to mitigate damages is much the same as it is in English law. They agreed that it was not incumbent on the innocent party to take any risk in order to mitigate damages. I think that their view can be summed up in this way: the duty of the innocent party in regard to mitigation was to act reasonably in all circumstances. And I do not think that Dr. Badia disputed that if the injured party unreasonably failed to mitigate he could thereafter successfully contend that damages due to this failure to mitigate were recoverable under article 707 as "necessarily resulting" from the breach.

I have to determine Portuguese law as a matter of fact, and having listened to the evidence of the Portuguese lawyers on either side in this case I was left in some doubt whether the Portuguese courts would, in the circumstances of the present case, have held that the sum which the plaintiffs were contractually bound to pay Mourao was damage flowing directly,

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exclusively, immediately and unavoidably from the defendants' breach of contract. Being satisfied, however, that the duty to mitigate in Portuguese law, is for practical purposes the same as it is in English law, I am prepared for the purpose of this judgment to assume that, subject to this duty, the plaintiffs could have recovered the £3,500 under article 707.

This brings me to a consideration of the question whether the plaintiffs did act reasonably.

[His Lordship considered that question and relying on the documents and on the evidence of the defendants' witness, Rodrigues, came to the conclusion that it was unreasonable for the plaintiffs not to have attempted to sell the palm-oil on the Lisbon Produce Exchange. His Lordship was satisfied that it would have been possible for the plaintiffs to have sold the goods on the exchange on immediate credit terms at a price which would have been at least as high, and almost certainly considerably higher than the price at which the plaintiffs had contracted to sell the goods to the defendants; the plaintiffs would thus have been able to carry out their contract with Mourao and so have avoided paying him the £3,500 indemnity. His Lordship continued:] I am quite satisfied that any sale by the plaintiffs on the Lisbon Produce Exchange could have been effected at a price which would not have involved the plaintiffs in any loss due to the fact that the defendants had broken their contract with them. I should mention here that the plaintiffs' other head of claim, which is quantified at £1,000, represents the difference between the price of 14 escudos a kilogram at which they bought, and 14.20 escudos a kilogram at which they contracted to sell to the defendants. There are, I think, odd features in this case which require explanation on behalf of the plaintiffs. No such explanation was forthcoming, and, relying on the evidence of Rodrigues, I find it impossible to reach any other conclusion than the one which I have stated.

The result, therefore, is that while the plaintiffs establish that the defendants have broken their contract, they do not establish that they sustained damage, and are consequently only entitled to judgment for a nominal sum, which I assess at 40s.

Judgment for the plaintiffs, with costs up to the time of payment in of £5 by the defendants, thereafter the defendants to have three-quarters of their costs.

Solicitors: *Stoneham & Sons; H. B. Nisbet & Co.*

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June 17, 18.

Evershed M.R., Birkett and Romer L.JJ.

[Plaint No. J. 76.]

Landlord and Tenant—Rent restriction—Order for possession against statutory tenant in 1935—*Execution of order suspended indefinitely —Order statute barred—Death of tenant—Right of landlord to possession against tenant's niece—Small Tenements Recovery Act,* 1838 (1 *&* 2 *Vict. c.* 74), *s.* 1—*Increase of Rent and Mortgage Interest* (*Restrictions*) *Act,* 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *s.* 12 (1) (*g*) —*Rent and Mortgage Interest Restrictions Act,* 1923 (13 *&* 14 *Geo.* 5, *c.* 32), *s.* 4 (2) (4)—*Limitation Act,* 1939 (2 *&* 3 *Geo.* 6, *c.* 21), *s.* 2 (4).

In 1922 premises within the protection of the Rent Restriction Acts were let to a Mrs. A. The then landlord having served her with notice to quit, her contractual tenancy determined in June, 1935, and he applied to the justices for the issue of a warrant for possession under section 1 of the Small Tenements Recovery Act, 1838. The justices made an order dated July 16, 1935, for possession in 21 days, subject to the provision that so long as Mrs. A. paid the monthly rent, together with a further sum towards arrears of rent, the warrant should not be executed. The provisions of that order not having been adhered to, on January 31, 1939, the then landlord applied to the justices for the enforcement of the order for possession. The justices then made an order suspending the order for possession for a further period of three months upon the same conditions. On April 25, 1939, at the instance of the then landlord, a further order was made suspending the order for possession sine die. Thereafter Mrs. A. continued in occupation of the premises paying her rent regularly until her death intestate in October, 1952. During the whole of her occupation of the premises her niece, the first defendant, had been living with her and it was not disputed that, if Mrs. A. were a tenant of the premises at her death, the first defendant would become the statutory tenant by virtue of section 12 (1) (*g*) of the Act of 1920. The plaintiff, who became the landlord of the premises by purchase in 1943, in these proceedings claimed possession. The county court judge made an order for possession holding that the order for possession made against Mrs. A., under section 1 of the Small Tenements Recovery Act, 1838, was a final order and had determined her tenancy and accordingly that no statutory tenancy had devolved on the defendant:—

Held, that, by section 2 (4) of the Limitation Act, 1939, the warrant for possession ceased to have any efficacy a year or more before Mrs. A. died. Thereafter her occupation, the payment by her of rent, and the acceptance of that rent by the landlord could only be referable to a statutory or a contractual tenancy. Accordingly Mrs. A. was a tenant when she died and the first defendant was entitled to claim to succeed her as statutory tenant by virtue of section 12 (1) (*g*) of the Act of 1920.

Quaere, first, whether, having regard to the decision of the Court of Appeal in *American Economic Laundry Ld.* v. *Little* [1951] 1 K.B. 400; 66 T.L.R. (Pt. 2) 1080; [1950] 2 All E.R. 1186, there is any distinction between the effect of an absolute order for possession made under section 1 of the Act of 1838 and a conditional order for possession made under that Act on the rights of a person claiming to succeed to a statutory tenancy under section 12 (1) (*g*) of the Act of 1920. Second, whether if a statutory tenancy is terminated by the making of an order for possession, it would revive when the order ceased to be effective.

An order for possession suspended indefinitely or an order for possession which is likely to be in suspense for a long time is undesirable, particularly if the circumstances indicate that there may be a claim to succession under section 12 (1) (*g*). In such a case no order should be made for possession in the first instance, the defendant agreeing to pay the rent and arrears, or to perform whatever conditions the court may think to impose, that agreement should be recited in the order, and liberty given to apply for an order for possession upon breach or non-fulfilment of the conditions. Then, if and when an order for possession is made, it will be an absolute order.

APPEAL from Judge Rawlins sitting at Redruth County Court.

In September, 1922, William Vivian, the then owner of No. 33 Centenary Street, Camborne, being premises within the protection of the Rent Restriction Acts, let them to a Mrs. Andrews at the monthly rent of £1 6s. 8d. From then onwards Mrs. Andrews lived in the premises with her niece Miss Bessie Allen, the first defendant, and a number of other relatives. In May, 1935, Vivian gave Mrs. Andrews notice to quit, which was effective to determine the contractual tenancy in June, 1935.

He then made an application to the East Penwith justices for the issue of a warrant for possession under section 1 of the Small Tenements Recovery Act, 1838.[1] On July 16, 1935, an order was made the exact form of which was somewhat uncertain, but the county court judge held that a warrant for possession was then issued. The justices appeared to have made an order, in exercise or purported exercise of their powers under the section, of which the intended effect appeared to have been that possession was to be given within 21 days, subject to the provision that so long as Mrs. Andrews paid regularly the monthly rent of £1 6s. 8d., together with a further sum of 14s. 4d. on account of arrears, the warrant should not be executed. The order was, subject to those directions, to remain in force for three months or for such further period as the court should from time to time direct. Those last words were a reflection of the terms of section 4 (4) of the Rent and Mortgage Interest Restrictions Act, 1923.[2] It was not disputed that the premises were within the scope of the Act of 1838.

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[1] Small Tenements Recovery Act, 1838, s. 1: " . . . upon proof of service of the notice [to quit], and of "the neglect or refusal of the tenant "or occupier, as the case may be, it "shall be lawful for the justices acting for the district, division, "or place within which the said "premises or any part thereof "shall be situate, in petty sessions "assembled, or any two of them, to "issue a warrant under their hands "and seals to the constables and "peace officers of the district, division, or place within which the said "premises or any part thereof shall "be situate, commanding them, "within a period to be therein "named, not less than twenty-one "nor more than thirty clear days "from the date of such warrant, to "enter (by force if needful) into the "premises, and give possession of the "same to such landlord or agent."

The provisions for payment of rent and arrears not having been complied with, on January 31, 1939, Vivian applied again to the East Penwith justices for enforcement of the order for possession made on July 16, 1935. On that occasion it appeared that the order was " suspended " (whatever might be the precise effect of that direction) for a further period of three months upon the same conditions as those stated in reference to the first order. From then onwards the performance of Mrs. Andrews in paying her rent and arrears was much improved, so that on April 25, 1939, Vivian himself communicated with the court and invited the court to make a further suspension, and the operation of the order was accordingly suspended sine die. The intention of the parties appeared to be that for an indefinite period the execution of the warrant was to be suspended, provided Mrs. Andrews punctually paid her rent and regular instalments of the arrears. The terms of the orders are furthered considered in the judgment of Evershed M.R. In 1943, Mrs. Mills, the present landlord, acquired the property from Vivian. On October 5, 1952, Mrs. Andrews died intestate, and no grant of administration of her estate had been made.

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[2] Rent and Mortgage Interest Restrictions Act, 1923, s. 4 (2): " At " the time of . . . the making or " giving of any order or judgment for " the recovery of possession of any " such dwelling-house . . . or in the " case of any such order or judgment " which has been made . . . and not " executed . . . the court may adjourn " the application, or stay or suspend " execution on any such order or " judgment, or postpone the date of " possession for such period or periods " as it thinks fit, and subject to such " conditions (if any) in regard to pay- " ment by the tenant of arrears of " rent, rent . . . and otherwise, as " the court thinks fit, and, if such " conditions are complied with, the " court may, if it thinks fit, discharge " or rescind any such order or judg- " ment. . . . (4) Notwithstanding " anything in s. 143 of the County " Courts Act, 1888, or in s. 1 of the " Small Tenements Recovery Act, " 1838, every warrant for delivery of " possession of, or to enter and give " possession of, any dwelling-house " to which this Act applies, shall re- " main in force for three months . . . " in the case of a warrant under the " Small Tenements Recovery Act, " 1838, from the date of the issue of " the warrant, and . . . for such fur- " ther period or periods, if any, as " the court shall from time to time, " whether before or after the expira- " tion of such three months, direct."

In these proceedings the landlord sought to recover possession of the premises. There were seven defendants to the action, the first defendant being Miss Allen, and the remaining six defendants being other persons who were living in the premises when Mrs. Andrews died.

From 1922 until 1952, Miss Allen was residing in the premises with her aunt, Mrs. Andrews, and it was conceded for the landlord that the judge was entitled to find, and did correctly hold that, if all other points were decided in Miss Allen's favour, she ought to be treated as a member of Mrs. Andrews' family within section 12 (1) (*g*) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920; but, in order that she might be entitled to remain in occupation by virtue of the Rent Acts, she had to show that her aunt, Mrs. Andrews, was at the time of her death either a contractual or a statutory tenant of the premises.

The question to be determined was whether the making of the order in 1935 by the justices, the operation of which was subsequently suspended until April, 1939, and then sine die, was such as to put an end altogether to the statutory tenancy which Mrs. Andrews formerly enjoyed, and thereby prevented the operation in Miss Allen's favour of section 12 (1) (*g*).

Upon that issue the county court judge concluded as follows: "Following the reasoning of the Court of Appeal in *American* "*Economic Laundry Ld.* v. *Little* [3] I find that the landlord is "entitled to an order for possession. For the purpose of this "decision I am assuming that Miss Allen is a member of the "tenant's family within the meaning of section 12 (1) (*g*) of the "Act of 1920 as amended by section 13 of the Act of 1933 and "section 1 of the Act of 1935. The fact that the warrants "cannot be enforced does not in my opinion affect the right "of the landlord. I respectfully agree with Somervell L.J. when "he says: 'A tenant in that position, that is to say where an "'absolute order made against him, notwithstanding that it may "'be suspended, is not a tenant for the purposes of section 12

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[3] [1951] 1 K.B. 400, 404; 66 T.L.R. (Pt. 2) 1080; [1950] 2 All E.R. 1186.

" ' (1) (*g*). That, I think, is in accordance with a commonsense " ' application of the paragraph. It would be an illogical result, " ' I think, if the paragraph gave protection to a widow which the " ' court had expressly taken away from her deceased husband, on " ' whose tenancy she relies, that tenancy having been brought to " ' a suspended end by the order for possession ' . . . . In view " of my opinion that the order was a final order, and not a " conditional one, it is unnecessary for me to consider what would " be the position if the order had been conditional." The judge thereupon made an order for possession.

Miss Allen appealed. The notice of appeal appeared to have been served on behalf of all seven defendants, but it was argued on the footing that Miss Allen was the sole appellant and that she alone claimed a right to remain in the premises.

Humphrey Tilling for Miss Allen. The county court judge was wrong in holding that the order of July 16, 1935, was a final order. It cannot have been a final order, since its operation was postponed and the landlord could not claim possession under it. The powers to suspend the execution of an order made under section 1 of the Small Tenements Recovery Act, 1838, were extended by section 5 (2) and (4) of the Act of 1920, now section 4 (2) and (4) of the Rent Act of 1923. The conditions in the order of 1935 that the warrant for possession should not be enforced so long as Mrs. Andrews paid the rent and also something off the arrears made that order a conditional order. It was held in *American Economic Laundry Co. Ld.* v. *Little* [3] that a final order for possession against a tenant removes from him the protection of the Rent Acts, but the question of the effect of a conditional order was expressly reserved. There is a vital difference between a final and a conditional order for possession. A final order brings a statutory tenancy to an end. If the order is discharged, the statutory tenancy revives. If the order is conditional, the statutory tenancy continues: *Merrick* v. *Lenihan*.[4] This follows from the inherent differences between the two forms of order. A final order gives possession to the landlord, either immediately or at a future date. Accordingly, unless the tenant succeeds in an application under section 4 (2) of the Act of 1923 possession will, and must, be given to the landlord. On the other hand, any form of order under which possession will only be given to the landlord on the breach of some condition by the tenant is a conditional order. The tenant may, by fulfilling the condition, prevent possession ever being obtained by the landlord. In the case of a final order, the tenant can only stave off the landlord's right to possession for a limited period. In the case of a conditional order, the tenant can do so indefinitely. The statutory tenancy accordingly continues, and should the tenant die a member of his family can succeed under section 12 (1) (*g*) of the Act of 1920. The court has power to suspend the operation of an order for possession indefinitely: *Yates* v. *Morris.*[5]

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[3] [1951] 1 K.B. 400, 404.

[4] (1950) 156 Estates Gazette 68.

The order of 1935 became statute barred under section 2 (4) of the Limitation Act, 1939, and unenforceable at some time before Mrs. Andrews' death. Thereafter she continued in possession, paying rent. She cannot have continued in possession as a trespasser; her statutory tenancy must have revived or she must have become a contractual tenant. It is, however, not conceded that a conditional order suspends a statutory tenancy. The reasoning in *Moodie* v. *Hosegood*[6] does not apply here. When Mrs. Andrews had paid off all the arrears of rent, what was her position then? Once the protection of the Acts is lost, it is submitted that it is gone for ever and cannot be revived unless a new contractual tenancy is granted. That suggests that a conditional order for possession cannot have the effect of determining a statutory tenancy. There is no instance on the authorities of a statutory tenancy reviving after it has been determined: *John M. Brown Ld.* v. *Bestwick*[7]; *Brown* v. *Brash & Ambrose.*[8]

Turning to a subsidiary point: the warrant issued by the justices in 1935 was a nullity because of the conditions annexed to it. The justices had only the powers conferred by section 1 of the Small Tenements Recovery Act, 1838. They could suspend the order for possession, but they could not fix conditions for that suspension: *Fearon* v. *Norvall*[9]; *Shelley* v. *London County Council.*[10]

The power of the justices is limited to issuing a warrant. They cannot make an order for possession. Although this point was not raised below, the court can hear it since this case involves a question under the Rent Restriction Acts: *Boyer* v. *Warbey*.[11]

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[5] [1951] 1 K.B. 77; 66 T.L.R. (Pt. 2) 707; [1950] 2 All E.R. 577.

[6] [1952] A.C. 61; [1951] 2 T.L.R. 455; [1951] 2 All E.R. 582.

[7] [1951] 1 K.B. 21; 66 T.L.R. (Pt. 2) 248; [1950] 2 All E.R. 338.

[8] [1948] 2 K.B. 247; 64 T.L.R. 266; [1948] 1 All E.R. 922.

[9] (1849) 5 Dowl. & L. 445.

[10] [1949] A.C. 56; 64 T.L.R. 600; [1948] 2 All E.R. 898.

G. D. Petherick for the landlord. The county court judge found as a fact that a warrant for possession was issued by the justices in 1935. That finding binds the Court of Appeal. Secondly, an order made by justices under section 1 of the Act of 1838 operates as a judgment: *Reg.* v. *Newent Justices*.[12] The issue of a warrant for possession is both a judicial and an administrative act. So far as it is a judgment it is within section 4 (2) of the Rent Act of 1923 and the justices have power to impose conditions. Subsection (4) of section 4 deals with the administrative aspects of the justices' order. Section 4 (2) of the Act of 1923 was intended to cover all proceedings, whether in the county court or before justices under the Act of 1838. In section 4 (2) "court" means the court before which the proceedings are brought.

Section 2 (4) of the Limitation Act, 1939, has made it impossible to enforce the warrant for possession, but it has not nullified the order. Mrs. Andrews never asked to have the warrant discharged. The order of the justices determined her statutory tenancy and it prevents such tenancy reviving. Although the landlord cannot enforce the order for possession, he can use it as a shield. After the issue of the warrant section 15 of the Act of 1920 no longer applied. The order the justices made was an absolute order, the conditions imposed being administrative only. Mrs. Andrews was not a tenant at her death and accordingly Miss Allen cannot claim to be a statutory tenant under section 12 (1) (*g*) of the Act of 1920.

EVERSHED M.R.: This appeal has given rise to considerable argument upon certain points of great difficulty, and, I think, importance, though, in the event, the matter can in my judgment be determined, and should be determined, upon a relatively simple point.

[His Lordship stated the facts, and continued:] It is plain that the only jurisdiction conferred upon the justices by the Act of 1838 is to issue a warrant for possession. It is therefore one difficulty in the way of the landlord in this case that, according to the notes of what took place in the petty sessional court of East Penwith, there is no express reference to the issue of a warrant at all. In the rather longer note which was before the county court judge, which the clerk certified, the court appears on July 16, 1935, to have made an order for possession, and then the note continued: "The warrant to be suspended," but to remain in force for three months, etc. In the rather shorter certificate which is dated June 13, 1953, the note is: "Order "made for possession within twenty-one days, not to be executed "so long as respondent pays £2 a month on account of current "rent accruing and arrears owing." Judging solely from the evidence of those notes, it appears at least doubtful whether any warrant under the hands and seals of the justices and addressed to the constables ever was, in fact, issued. That point however was not taken in the court below. In the particulars of claim the landlord pleaded that a warrant had been issued, and, although it is true that the defence put the landlord to proof of the whole of her claim, no point was made calling upon the landlord strictly to prove the issue of a warrant. According to his notes of judgment, the judge, possibly proceeding, as he was entitled to do, upon the principle that everything should be assumed to have been correctly done, opened his judgment thus: "The following facts were admitted or were proved to my "satisfaction. . . . In July, 1935, the then landlord took pro"ceedings under the Small Tenements Recovery Act, 1838, "against Mrs. Annie Andrews and a warrant for possession was "issued."

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[11] [1953] 1 Q.B. 234; [1952] 2 T.L.R. 882; [1952] 2 All E.R. 976.

[12] (1845) 4 L.T.(o.s.) 289.

Mr. Tilling has said that, although the point that no warrant was ever issued was not taken below, it should be open to him in this court, on the ground that we are here dealing with a rent restriction matter, and that, by the imperative words of the Act of Parliament, the court cannot make an order for possession unless the court is satisfied that the conditions upon which alone the order can be made have been satisfied. I do not think, however, that that argument would suffice to enable this point to be taken here, when it had not been taken below. The question whether a warrant was or was not issued was a question of fact, and, if the defendant in the court below has chosen to concede, expressly or implicitly, that matter of fact, so that the judge was entitled to conclude as he did, it seems to me that the provisions of the Rent Act are not such as to empower or authorize us to go afresh into a matter of fact—which indeed we would be quite unable to do, having now no material available to enable a conclusion to be reached. To whatever doubts therefore the form of the clerk's notes might give rise, I

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think we are entitled to assume, and must assume, that the judge rightly held that a warrant for possession had been issued.

That, however, is not entirely the end of the difficulties arising out of the justices' orders, because the consequences of the impact of the rent restriction legislation upon the Small Tenements Recovery Act, 1838, are obscure. Subsections (2) and (4) of section 4 of the Rent Act of 1923 are relevant. [His Lordship read the subsections and continued:] Considering first subsection (4), it seems to me plain enough that, notwithstanding the limits of time stated in section 1 of the Small Tenements Recovery Act, 1838, namely, that the warrant must be executed within a period not less than twenty-one nor more that thirty clear days from the date of the warrant, the warrant in the case of a rent restricted house remains in operation for three months. What, however, happens to it during the three months, if it is not, in fact, executed or—if it is permissible for the justices so to do—if the justices give some direction whereby it could not properly be executed? So far as I can see, though the matter is not one on which it is necessary for me to express a final view, the answer to that question appears to be provided by section 4 (2) of the Act of 1923. Mr. Petherick observes, and I think Mr. Tilling agrees, that a warrant of this nature is not merely an administrative act, comparable to the issue of a warrant for the purpose of executing some earlier judgment, it is in itself both the judgment and its form of execution; and therefore combines both the judicial and the administrative functions of the justices who order its issue.

If that is so, there is at any rate strong ground for suggesting that a warrant also can be comprehended within subsection (2) as being a judgment, so as thereby to confer upon the justices powers, at the time they make their order, to direct that it should not, in fact, be executed so long as some conditions which they impose are fulfilled.

It is, no doubt, not uncommon in the case of houses falling within the scope of the Small Tenements Recovery Act, 1838, for applications to be made to the justices; and, where the premises are also within the Rent Acts, it seems necessary, and certainly sensible (if effect is given to what appears to be the intention of Parliament) that the justices, at the time they direct the issue of the warrant, should be entitled to state that during the three months of the warrant's efficacy, it should not be executed so long as the tenant performs such terms and conditions as they may direct; but, unless it is extended by the court—and

I assume that that must mean the court that orders its original issue—the warrant would appear to expire and come to an end, so far as any efficacy is concerned, at the end of three months.

In the present case there was a substantial gap from July, 1935, until the next order in 1939—three and a half years later, when the same petty sessional bench directed that the original order should be suspended for a further three months from January 31, 1939. I assume that it was competent for them, if nothing had happened in the meantime, to make that direction so as to preserve the efficacy of the warrant for three months from January 31, 1939, though prima facie it would appear to have expired on October 16, 1935. Before the three months from January 31, 1939, had come to an end, a further order was made directing the suspension of the original order sine die.

What is the effect of those conditions, assuming that they were all effectively made within the jurisdiction of the justices? The answer to that problem seems to me to be reasonably clear, in view of the contentions put before us by counsel. The warrant has, in my judgment, ceased to have any efficacy, or to be enforceable as the result of section 2 (4) of the Limitation Act, 1939. In that Act the definition section, section 31, defines " action " in this way: " ' Action ' includes any proceeding in a court of " law." Section 2 (4) provides: " An action shall not be brought " upon any judgment after the expiration of twelve years from " the date on which the judgment became enforceable." According to Mr. Tilling, the judgment must have become enforceable at some date after the expiry of the original three months and before the second order of January 31, 1939 was made. For it is apparent that that second order was made because of the failure on Mrs. Andrews' part to comply with the terms of the original order; so that, if it remained efficacious at all, the landlord would have been enabled forthwith to apply for enforcement. As at present advised, however, I think that the warrant ceased to be enforceable before that date, for *Lougher* v. *Donovan*,[1] seems to be an authority for saying that, in the case of a warrant of this nature, the statute operates from the date of the warrant itself. If that is so, then it ceased to be effective so much earlier. In any event, the warrant in my judgment ceased to be capable of execution, the original order of 1935 ceased to have any efficacy, at the latest on some date appreciably before the date of Mrs. Andrews' death. If Mr. Petherick is right—and it is, of course, his case to contend that the warrant remained alive as long as possible—then it ceased to be efficacious some five years or more before Mrs. Andrews died.

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[1] [1948] W.N. 236; [1948] 2 All E.R. 11.

The result seems to me to be that there was a period of time —possibly a year, possibly five years—during which Mrs. Andrews continued in possession of these premises, paying rent, which was accepted by the landlord, before she died. Her occupation, the payment by her of rent, and the acceptance of that rent by the landlord, can be referable to one of two causes. It can be referable to Mrs. Andrews' right to remain in occupation as a statutory tenant. If, as Mr. Tilling's argument has run, the statutory tenancy came to an end once and for all when, on July 16, 1935, the justices made their first order, then it seems to me that the ordinary rules of the common law must apply, and that the continued occupation, etc., can only be referable to a contractual relation. There is in my judgment no room here on the evidence for the view that she was a licensee. On one ground or the other, therefore, it seems to me inevitable that Mrs. Andrews, when she died, was a tenant, statutory or contractual, and, in either case, once it is conceded that Miss Allen was a member of the family within section 12 (1) (*g*), Miss Allen must be entitled now to claim to be a tenant by virtue of that section.

It was at one time thought that the definition section, 12 (1) (*g*), applied only where what one might call the predecessor was a statutory tenant; but it has been held since *Moodie* v. *Hosegood*,[2] that that is not so. It matters not, therefore, for the purposes of this case whether Mrs. Andrews was a contractual or a statutory tenant at her death. For the reasons I have indicated, she must have been, I think, one or the other, and it follows necessarily that the appeal must succeed on that ground.

The case has raised a point of great difficulty and arguments of some nicety about the effect, for the purposes of applying section 12 (1) (*g*), of orders for possession, and a distinction has been drawn in the argument between what have been called final or absolute orders for possession and what have been called conditional orders for possession. In the circumstances of the case, out of respect to the arguments and in the hope perhaps of rendering some useful service to those county court judges whose duty it is to administer these Acts, I would like to make a a few observations upon this argument. It is not, however, necessary for me to express a conclusion on the really difficult

[2] [1952] A.C. 61; [1951] 2 T.L.R. 455; [1951] 2 All E.R. 582.

point which has emerged from the argument, namely, what happens, so far as a member of the family otherwise within section 12 (1) (*g*) is concerned, if his or her predecessor should die during the time that a conditional order for possession is in effective operation with regard to the premises?

If the order for possession is absolute, then *American Economic Laundry Ld.* v. *Little* [3] indubitably applies and in such case it has been held by this court that there is no room for the application in favour of the member of the family of the definition section. But Somervell L.J. expressly left open the question whether the same result would follow if the order for possession were conditional. In that case, it is important to note, the order which had been made was an order for possession to take effect on a future date, the point of the time lag being merely to give to the tenant an opportunity to remove himself and his belongings. In point of fact, the period was extended, but the case came on for hearing after the expiration of the extended period. The order was, however, always an order otherwise unqualified in terms; it was that the defendant must give up possession on the future date named.

Somervell L.J. having noted the county court judge's decision that the defendant was within the words in section 12 (1) (*g*) a " member of the tenant's family " and could claim to remain in possession,[4] continued: " In a long and careful judgment " [the county court judge] said, and I agree with him, that the " point is not free from difficulty. He referred first, to two state- " ments in *Brown* v. *Draper*,[5] where Lord Greene M.R. used " more than once words to this effect: ' the only ways in which ' " a tenant ' can be deprived of the protection of the Acts are (a) " ' by giving up possession, in which case no order for recovery " ' of possession against him is required; (b) having an order for " ' recovery of possession made against him.' Those words, read " literally, might be taken to indicate that the order for posses- " sion in itself deprived him of the protection of the Act. On the " other hand, the county court judge referred to this statement " by Scrutton L.J. in *Keeves* v. *Dean* [6]: ' I take it that ' the " tenant ' has a right as against all the world to remain in " ' possession until he is turned out by an order of the court.' " The difference between the literal meanings of those two

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[3] [1951] 1 K.B. 400.

[4] Ibid. 403.

[5] [1944] K.B. 309, 312; 60 T.L.R. 219; [1944] 1 All E.R. 246.

[6] [1924] 1 K.B. 685, 694; 40 T.L.R. 211.

"statements of the law is illustrated by this case. I agree with "the county court judge, in that I do not think that Lord "Greene had in mind what we have to consider here, "namely, the position of a tenant, a person who has been a "statutory tenant (I am not begging the question by using the "word 'tenant' but it is a convenient expression) between the "time when the order for possession is made and the time when "it falls to be executed having regard to a suspension granted "under section 5 (2) of the Act of 1920." Section 5 (2) is a reference to that section of the Act of 1920 now replaced by section 4 (2) of the Act of 1923.

I next note that lower down the page the Lord Justice said: "I agree with my brother Jenkins' observation, made in the "course of the argument, that the position of someone against "whom an order for possession has been made, and then "suspended at common law or under section 5 (2) of the Rent "Act of 1920 is sui generis. I do not think that the problem "which we have to solve is really assisted by considering in what "respect his position is the same quoad the landlord as it was "before the order was made. It is obviously fundamentally "different in this respect, that, whereas before, he was entitled to "the protection of the Act until successful proceedings were "taken, he is now in the position that proceedings have been "taken and that an order for possession has been made. All "that he has is a right to apply for postponement under section 5 "(2)."

Finally, the Lord Justice said [7]: "I am not deciding what the "position would be in a case of this kind where a conditional "order had been made against the deceased tenant: it may be "that the result would be the same; it may be that it would be "different. At any rate, there seems to me to be scope for "argument"—an observation which experience has proved to be amply justified.

Jenkins L.J. agreed, and said [8]: "During the intervening "period between the date of such an order and the date fixed "for delivery of possession it may very well be, and indeed "obviously must be, that the statutory tenant has certain rights "and certain obligations. For instance he would have to pay the "equivalent of the rent during the period of his occupation "between the date of the order and the date of giving up posses"sion. But that is not to say, and it obviously cannot be the

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[7] [1951] 1 K.B. 400, 406.

[8] Ibid. 407.

"case, that he is still the statutory tenant for all purposes." He proceeds: "Thus in the present case, assuming in the "defendant's favour that notwithstanding the existence of the "final order for possession, she could still become statutory "tenant of the premises by virtue of section 12 (1) (*g*) of the "Act of 1920, it seems to me at all events clear that the tenancy "to which she in effect succeeded could be no more than the "limited interest remaining to run between the date of the death "and the expiration of the date fixed for possession by the "order" and, as I indicated earlier, that had passed when the case came before the court. "For these reasons, and those stated by "Somervell L.J. I agree with him that the appeal should be "allowed." My brother Birkett confined himself to stating his agreement with what had been said.

It is clear from those passages that the effect was left open of a conditional order, so long as it remains an efficacious order capable of being enforced on fulfilment or non-fulfilment of the condition, upon what is called the right of succession under section 12 (1) (*g*). What happens if the tenant dies when such an order remains in operation? As I have already indicated, it is not necessary to determine that question in this case. It has, however, been strenuously argued by Mr. Tilling that there is, in this respect, a real and fundamental distinction between an absolute order, that is an order which is to take effect on some fixed date without qualification, and a conditional order or what has been called a suspended order, that is to say an order which will not take effect at all so long as certain things are done; for, in the latter case, it is contended that the true object of the court in making the order was to avoid the very thing which an order for possession would achieve: it is the purpose of the court to say: "So long as you now faithfully comply with this, that or the other obligation, we will "not evict you." It is said that, the intention lying behind the two classes of order being different, their results will be different.

As it is not necessary to decide the question, I do not propose to do so; but I venture to indicate some difficulties in the way of what may appear at first sight perhaps to be the common-sense view of the so-called conditional form of order when the present problem arises (as it is apt to do though it may not frequently do so), on the death of the tenant leaving somebody who claims the benefit of the definition section. I begin by observing that though the original order be absolute, nevertheless as I read section 4 (2) of the Act of 1923, it may not only be discharged on application, but it may, in effect, be converted thereafter into a conditional order, for the language at the end of the subsection seems to contemplate that possibility. But if in a particular case an order is made, suspended so long as the rent is punctually paid and X shillings a week are paid off arrears and perhaps off taxed costs as well, the right of the tenant to remain in possession may be said not to be (at least exclusively) referable to the Rent Acts, because the terms on which occupation is retained are not merely the terms in the original contract, but are the terms in the contract plus the further terms imposed by the court. The truer view may be that the tenant's continued occupation is referable to the permission granted by the order, or, alternatively, to the combined operation of the order and the Act.

But there is a further technical difficulty which Mr. Tilling indicated, and it is this: the phrase "statutory tenant" is not one which is defined in the Acts, but is a phrase which long usage has made convenient for describing the person who is entitled to remain in occupation by virtue of the Acts. That right is specified in section 15 (1) of the Act of 1920: "A tenant who by virtue of "the provisions of this Act retains possession of any dwelling-"house to which this Act applies shall, so long as he retains "possession, observe and be entitled to the benefit of all the "terms and conditions of the original contract of tenancy."

Putting it interrogatively, is a tenant—whose right to remain in possession is dependent on compliance with the terms of an order of the court which may go beyond, and in the case I have supposed would go beyond, the terms of the original contract—within that subsection? The right to remain in possession, provided that the terms of section 15 are otherwise complied with, depends upon what was section 5 (1) of the same Act of 1920, now section 3 (1) of the Act of 1933. It is so well known that I do not take time to read it, except to observe that it begins: "No order or judgment "for the recovery of possession of any dwelling-house to which "this Act applies . . . shall be made or given unless . . . ." In a case of a person against whom a so-called conditional order for possession has been made, the argument is that section 3 (1) is no longer really applicable. So long as the tenant satisfies the conditions of the order, he is entitled to remain by virtue of the order. If he does not satisfy the conditions, the order, already made, operates; no further order is required. Therefore, either the making of the order has already determined the statutory tenancy, or he is not a statutory tenant, because no further order for dispossession is required.

Finally, there is this problem: section 12 (1) (*g*) is a definition section; it does not give any independent right to the relative, but it says that a relative, complying with the conditions of the paragraph, shall be deemed to be a tenant within the meaning of section 15. Again I put Mr. Tilling's argument interrogatively: can it be said that a relative is a tenant within section 15 if it has to be conceded—though I am aware that in spite of the observation of Jenkins L.J. in the *American Laundry* case [9] it may not be conceded—that the right of the relative must be limited to the right which the predecessor had; in other words, that the relative cannot claim any better right to remain in possession than was possessed by the person he or she has succeeded? If the person he or she succeeded was bound, as a condition of retaining occupation, to pay something more than the rent, then should not the relative be similarly bound? But is the relative so bound? He or she was not a party to the order; and it does not appear clear to me that it is enforceable against him or her. And if it is, is he or she then a "tenant" within section 15?

These arguments are formidable, but I give no answer to them, because it is unnecessary in this case so to do. I have referred to them for another reason. Before stating it, I would like to say that I start, I confess, with some reluctance to give support to fine distinctions which may be of vital importance to many people, but which depend upon the difference between what may be upon its true construction, on the one hand, an absolute order, on the other, a conditional order. Orders are sometimes made by county court judges in somewhat informal terms, and it is possible to imagine long arguments on the question whether a particular order, a little peculiar in its terms, was in truth absolute or conditional.

I was fittingly reminded by Mr. Tilling of an observation of my own in a case not long ago before this court namely, *Tideway Investment and Property Holdings Ld.* v. *Wellwood.*[10] That was a very peculiar case, as appears from the form of the judgment which Harman J. had given. His order was: "This court doth "order that upon the execution by the tenant of an agreement in "terms to be agreed between the parties or, in the alternative, "to be settled by the judge, within twenty-one days of the date

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[9] [1951] 1 K.B. 400.

[10] [1952] Ch. 791, 814; [1952] 2 T.L.R. 365; [1952] 2 All E.R. 514.

"when its terms are agreed or settled by the judge and upon the "deposit and payment" of certain sums of money, "this court "doth not think fit to make an order for possession, but in default "of such execution, deposit and payment, it is ordered that the "landlord do recover possession." I said this: "In cases of this "kind, I also think it is more desirable, as a rule, to make an "order for possession and suspend it on certain terms than to "follow the converse course adopted in this case." I had referred to what Morton L.J. said in an earlier case of *Bell London and Provincial Properties Ld.* v. *Reuben*,[11] which attained some notability because the whole case turned on whether the tenant was justified in keeping a dog.

The Lord Justice said[12]: "I think, possibly, if I had been "trying the case, I might have inserted some safeguard for "the assistance of the landlords; for example (though I have "not thought out the exact form of words) I might have ordered "that possession should be given but that the order should not "take effect so long as the lady satisfied the landlords, perhaps "monthly or every two months, by some medical certificate, that "her health still required the presence of the dog."

It is, I think, plain that neither Morton L.J. nor I had this very difficult and intricate point arising from the definition section 12 (1) (*g*) in mind. Having it in mind, and having heard the arguments, and having stated the sort of difficulties which arise, it seems to me that the form of order, namely, an order for possession suspended so long as certain conditions are complied with, is not by any means necessarily in all cases the most satisfactory form of order to make. I think it may well be, if the intended suspension is likely to be short, that such a form of order is satisfactory and saves further application. It would, I imagine, be made in expectation that the conditions would be complied with, so that in due course the order would naturally run off or perhaps subsequently be discharged. But I cannot think that an order for possession suspended indefinitely, as was done in this case, or an order for possession, which is likely to be in suspense for a very long period of time, is by any means necessarily a satisfactory or, as I venture to think, the best form of order, particularly if, as may be the case, the circumstances indicate at least the possibility of a claim to what I will call succession being made under section 12 (1) (*g*). I confess I should have thought that in those cases, and perhaps in many others, there is much to be said for a form of order to this effect: that the defendant should be required to undertake or agree (for I do not suggest save perhaps in exceptional cases that the defendant should be exposed to the final consequences of an undertaking to the court) to pay the rent and arrears, or perform whatever other conditions the court may think proper; that that undertaking or agreement should be recited in the order; that the court should then make no order for possession, but should give liberty to apply for an order for possession upon breach or non-fulfilment of the conditions. Then, if an order is made at all, it is likely to be an absolute order operating at once or certainly, and nobody is left in doubt as to its effect. By that form of order, this extremely difficult problem would be avoided. I hope that possibly the judges, who have the difficult task of administering this legislation, may think it a more convenient course in many cases to adopt that form of order which at any rate is to me familiar and to some extent hallowed by its use in comparable form in the Chancery Division in which I was fortunate to be brought up.

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[11] [1947] K.B. 157; 62 T.L.R. 653; [1946] 2 All E.R. 547.

[12] [1947] K.B. 157, 164.

I have said so much out of respect for the arguments, but I have not decided, and have carefully avoided deciding, a point which does not here arise. In particular, I do not want in what I have said to create doubts where the obvious intention has been to keep alive the existing statutory tenant's rights so long as the conditions imposed are complied with. I only add that, whatever be the answer to these difficulties, it is far from clear to me that even if a statutory tenancy is to be treated as terminated by the making of any order for possession, it would not properly revive when the order ceased to be effective, or that the statutory tenancy is not capable of co-existing with the operation of the order. But, in the latter case, it seems to me that obscurities of construction arise and doubts as to the precise obligations of him or her who may succeed to the tenancy, all of which are avoided if the form of order be that which seems to me in appropriate cases to be preferable.

With those observations, however, I return whence I came, to state my answer to the short point, i.e., that Mrs. Andrews must either have been a statutory tenant or a contractual tenant. In my judgment this appeal ought to be allowed, and the order for possession against Miss Allen discharged.

BIRKETT L.J. I am of the same opinion and I can state quite shortly the principal point on which my decision turns.

In all cases under the Rent Acts my experience is that, though in the long run the point upon which the decision turns may be simple, it always requires a considerable amount of argument about various sections of statutes and cases before the simple point is perceived. I think it wise to confine oneself to that simple point, and I do not propose to go into many of the matters which have been raised in the very interesting arguments which have been placed before us.

The present action began in this way: The landlord became the owner of 33 Centenary Street, Camborne, in Cornwall, in the year 1943. At that time Mrs. Andrews had been the tenant for over twenty-one years, having become tenant in the year 1922. After 1943 until her death in 1952 she continued to be in occupation of the premises. She had, therefore, been in those premises for well over thirty years. Miss Allen, who, so far as this court is concerned, is the only effective defendant in this action, was a niece of Mrs. Andrews and had lived in those premises herself for pretty well the same period—well over thirty years. The claim was brought by the landlord in 1953, after the death of Mrs. Andrews, and the allegation made in the statement of claim was that Miss Allen and all the other members of the family who were living in the premises were trespassers and had no right to remain in occupation, to which they all made answer: "We claim to be protected by the Rent Acts."

I think that the case can be determined upon this point: Mrs. Andrews was either a statutory tenant or inevitably she was a contractual tenant. The statement of claim had recited that on July 16, 1935, the court at East Penwith issued a warrant under the Small Tenements Recovery Act, 1838. In the course of the argument considerable doubt was cast upon whether a warrant had actually been issued, in view of the form of the order. The learned judge's finding begins: "The following facts were "admitted or were proved to my satisfaction," and he then states: "In July 1935 the then landlord took proceedings under "the Small Tenements Recovery Act, 1838, against Mrs. Annie "Andrews and a warrant for possession was issued. This "warrant was suspended." In view of that finding, this court, at any rate, must take it to be the fact that such a warrant was in fact issued in 1935, as the statement of claim alleges. Then it recites further the proceedings in 1939, when a further order was made. It is also to be observed that in 1939, the solicitors to the landlord wrote a letter asking that the operation of the order made in 1935 should be suspended sine die, as the rent had been paid as promised on January 31, 1939.

One of the remarkable facts of the case is that from 1939 until the year 1953, when these proceedings were brought in the county court for recovery of possession, there had been no trouble of any kind for all those years; the rent had been paid; the rent had been accepted; and apparently no question of any kind arose until, of course, the death of Mrs. Andrews.

I would like to express my very strong agreement with what the Master of the Rolls said in his judgment about the form of the order. In this case the judge in the court below decided that the order made in 1935 was a final order. The expressions that are used are, " I am satisfied that the effect of the issue by the " justices in 1935 of a warrant for possession was to grant to the " then landlord a final order for possession, the execution of the " warrant being suspended, ultimately sine die. I am satisfied " that the warrant could have been revived by the court under " section 5 (4) of the Rent Act of 1920, but that the Limitation " Act, 1939, made it impossible for such revival." He then refers to *American Economic Laundry Ld.* v. *Little*,[13] and, following the observations of Somervell L.J. in that case about the effect of the final order, as he described it, he came to the conclusion which he recorded and against which appeal is made.

The argument that was addressed to us, at some length necessarily, was that the judge was wrong and that this was not a final order, and the consequences spoken of by Somervell L.J. did not therefore follow, but that this was plainly a conditional order. The trouble about that is that the order recites " Order " for possession to be given; warrant to be suspended." It is said upon the one side that however one frames it, one begins by saying that there is an order for possession and the argument here before us was that this was in truth a conditional order and ought to be construed in a particular way.

In *American Economic Laundry Ld.* v. *Little*, Somervell L.J. said [14]: " [counsel for the landlords] referred to the fact " that, under section 5 (2) of the Act of 1920, orders for possession may take either of two forms: there may be, as here, an " absolute order the execution of which is suspended: or there " may be a conditional order, that is to say, the order for possession does not become operative so long as certain conditions " are fulfilled, for example, payment of rent or abatement of a

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[13] [1951] 1 K.B. 400.

[14] Ibid. 406.

"nuisance." Then he goes on to say how that may be illustrated, and he adds: "I am not deciding what the position would "be in a case of this kind where a conditional order had been "made against the deceased tenant: it may be that the result "would be the same; it may be that it would different. At any "rate, there seems to me to be scope for argument which would "require serious consideration, that different results would ensue. "Therefore it is better to leave that question to be decided if and "when it arises."

If the order went in the form which my Lord suggested in his judgment, of course that kind of situation would not arise. I observe that the practice has been to use words like "absolute," "final," "conditional," "suspensory." They lead to the kind of discussions which have occupied very much time in this appeal. For example, it is said that the true effect of an absolute order is to say: "We make an order for possession," and then the tenancy comes to an end; that if one has what may be properly termed a conditional order, then, in truth, there is no ending of the tenancy, but what the court is seeking to say, though for administrative purposes it may use this particular form of words, is: "We have power to determine this tenancy on "the facts proved before us, but we do not choose to do so; we "leave the tenancy untouched, but we say so long as you fulfil "these conditions about payment of rent or whatever it may "be, so long will the tenancy continue; but if you do not, then "in truth we shall make an order for possession." That is the kind of argument.

I observe in Megarry's Rent Acts, 7th ed., p. 230, that that attitude is adopted towards the practice which has grown up with regard to absolute, conditional, final and suspensory orders. It is there stated: "In considering the effect of an order for possession made under these provisions, a distinction must be made "between the two forms of order which the court can make, "namely, an absolute order for possession which is suspended in "its operation, and a conditional order for possession (sometimes "somewhat misleadingly called 'a suspensory order'). Notwithstanding the suspension, an absolute order forthwith determines "the statutory tenancy, so that although the former tenant is in "possession during the period of suspension on terms which in "general are identical with those of his former statutory "tenancy, his position is sui generis, in some ways resembling "that of a licensee by indulgence of the court. A conditional "order, on the other hand, leaves the statutory tenancy still in "being, though shadowed by a Damoclean sword." In support of that proposition *Merrick* v. *Lenihan* [15] and *Lee Haven Estates Ld.* v. *Daley* [16] are cited.

But it is perfectly plain that the use of this language "conditional order" does give rise, as it has given rise in the present case, to many speculations and to many doubts which would be resolved entirely if the form of order suggested by my Lord were in common use, that is to say: "We make no order; we lay "down certain conditions about the payment of the rent, and "we give the landlord power to come and say: 'Those conditions about the payment of the rent have not been fulfilled, "'I now ask you to make an order.'" I should have imagined that a great deal of ambiguity might be saved if that method were adopted. But, as I say, I think it probably wise to stick to the simple point, as I term it, upon which this case can be determined; because any observations upon this, or any other form, in this case may very likely be quoted in some case, where the facts are entirely unexpected and altogether different. It seems to me plain that, whatever the decision on the first point may be, whether the judge was wrong in saying this was a final order, and in coming to his conclusion upon that basis, and whether the true construction of the matter, looking at all the circumstances, is that this was in truth a conditional order in the sense in which I have just cited those words: "We do not "intend to make an absolute order; we refrain from so doing; "we have power to put an end to it, but we do not do so; we "leave it in being"—whether that is the true view as to the conditional tenancy, it is not, I say, necessary to determine. I have my own view about it, but I think it is enough to say that it is either that, or, on the facts of this case, a contractual tenancy.

It is perfectly plain that this order of 1935, recited in the statement of claim and relied upon in this case in the year 1953, at any rate, some time in 1947, at the latest, was an order which could not possibly be enforced. Argument again rose upon that matter: Is the order a nullity now? Has it any validity still? It was suggested by Mr. Petherick that it could be used in some way as a shield; but for my own part I do not quite see the efficacy of the shield. If one says: "Here is an order, but I can "do nothing about it; I cannot enforce it; the courts will not "regard it as being effective or valid"—at any rate that was the argument—this could not be denied, that, certainly down to 1952, so far as the evidence went, during a period of probably five years before Mrs. Andrews died, she was in possession and paying rent all that time. There had never been a question raised about the rent since 1939. The landlord, who became the landlord in 1943, had been accepting rent right down to 1952. I should have thought, therefore, that the conclusion was irresistible that, if there was not here a statutory tenancy, there was certainly a contractual tenancy. In order to defeat this claim by the landlord, Miss Allen must say: "I come within section 12 (1) (*g*) "of the Act of 1920." So far as the technical side of the matter is concerned, it is not in issue that she is a member of the family. She has been residing there for well over thirty years, and she says: "I am that person, and there was here either a statutory "tenancy which enables me to continue in occupation, or there "was a contractual tenancy; I do not mind which it is." In my view, therefore, this appeal succeeds.

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[15] 156 Estates Gazette 68.

[16] (1950) 156 Estates Gazette 442.

ROMER L.J. I agree that the appeal must be allowed. After the judgments which have been delivered, I have very little to add. The ratio decidendi of the judge's decision appears from the following sentence in his judgment; he said: "I am satisfied that "the effect of the issue by the justices in 1935 of a warrant for "possession was to grant to the then landlord a final order for "possession, the execution of the warrant being suspended, "ultimately sine die." On that view he decided the case. But the point was not presented to him, as it has been presented to us, that, if that view be right, the inevitable result, having regard to the operation of the Limitation Act, 1939, and to the payment and acceptance of rent, was to constitute Mrs. Annie Andrews a contractual tenant, prior to and at the time of her death. If, on the other hand, the judge was wrong in the view that he took, then, for the reasons which have been stated by my Lord, it would follow that Mrs. Andrews was a statutory tenant at the time when she died. On either view Miss Allen would succeed in this appeal.

That being so, I propose not to express any concluded view either on the question whether the order of 1935 operated as a final or as a conditional order for possession, or on the question as to what rights Miss Allen would have had if the order was a conditional order, to succeed her aunt, if Mrs. Andrews had died while the order was still in operation. It seems to me that each of these questions gives rise to difficulties which have been stated in the arguments before us, and which have been indicated in the

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judgments of my brothers. As I say, I express no definite view upon either of them, but I certainly agree that justices should not make orders for possession, and then suspend their operation for what may be a considerable period of time. So to do leads to trouble. It has led to trouble in this case.

I entirely agree, with respect, to the form of the order which my Lord has indicated as a desirable form of order to adopt. I agree that the appeal should be allowed.

Appeal allowed.

Solicitors: *Gregory, Rowcliffe & Co. for Peter Bray & Harris, Redruth; Walters & Barbary, Camborne.*

B. A. B.

C.-M. A. C.
1953
July 13, 14.
Lord Goddard C.J., Parker and Donovan JJ.

REGINA *v.* DURKIN.

Court-Martial — Power to dissolve — Charge sheet — Signature of commanding officer—Whether necessary—Condonation—Army Act, 1881 (44 *&* 45 *Vict. c.* 58), *s.* 53—*Rules of Procedure,* 1947, *rr.* 56, 66.

The appellant, a corporal in charge of a cook-house, was tried before a district court-martial on two charges of stealing public property contrary to section 18 (4) of the Army Act, contained in a charge sheet approved by his commanding officer but signed by another person. The court-martial found that the appellant's plea of condonation in bar of trial was proved. The confirming officer refused to confirm the finding. It was suggested by the Directorate of Army Legal Services that as the charge sheet had been incorrectly signed, the court-martial should be dissolved and a second one convened, and that was done. The appellant was tried on a fresh charge sheet signed by his commanding officer and was found guilty of both offences. He appealed on the ground that there was no power to dissolve the first court-martial and therefore the proceedings before the second court-martial were null and void:—

Held, that in addition to the powers to dissolve a court-martial given by section 53 of the Army Act and rule 66 of the Rules of Procedure, a convening authority had power to dissolve a court-martial if the proceedings were in some way irregular or if matters had arisen which were prejudicial to the prisoner; the position was the same as in civil courts where during the course of a trial something occurred which was so prejudicial to the prisoner that the only proper course for the presiding judge was to discharge the jury and begin the case again.

[Reported by Miss C. J. ELLIS, Barrister-at-Law.]

Held also, that there were no provisions in the Army Act or the Rules of Procedure which required that a charge sheet should be signed by the commanding officer, but even if that were necessary, rule 56, which provided that a court-martial's decision which was confirmed would be valid "notwithstanding that the charge sheet "has not been signed by the commanding officer or the convening "officer, provided that the charges have, in fact, before trial been "approved by the commanding officer and the convening officer . . ." would have been sufficient to validate the proceedings before the first court-martial.

Before any court-martial proceedings had begun against the appellant his commanding officer ordered him from close arrest into open arrest, ordered a summary of evidence to be taken, and told him to resume his duties in the cook-house.

Held, that the offence committed by the appellant had not been condoned.

Appeal against conviction.

The appellant, John George Durkin, was a corporal, acting sergeant, of the Army Catering Corps, in charge of the main cook-house at the War Office Selection Board, Barton Stacey. He appealed against his conviction by a district court-martial on two charges of stealing public property contrary to section 18 (4) of the Army Act; the first charge was for stealing 20 eggs, three pounds of margarine, and one pound of butter, and the second for stealing a quantity of brussels sprouts and seven plates.

The incidents giving rise to the first charge occurred on December 1, 1952, when the appellant's commanding officer was a Major Drew-Wilkinson, the camp commandant. On December 10, a Major Littledale arrived at the camp to take over the duties of camp commandant. The incidents which gave rise to the second charge occurred on December 18. The civil police interviewed the appellant on the following day, and on December 20, he was brought before a magistrate and handed over to a military escort. On the same day the appellant was brought before Major Littledale, who remanded him in close arrest. At Major Drew-Wilkinson's request, Major Littledale dealt with the case on December 22; he ordered an abstract of evidence to be taken, released the appellant to open arrest, told him that he would be confined to camp, his quarters and the road between, and that he was to carry on with his normal duties in the cook-house. On December 27, the appellant was given a copy of the abstract of evidence by Major Drew-Wilkinson. On January 6, 1953, Major Littledale completed a taking and handing over certificate in respect of his appointment as camp commandant and Major

Drew-Wilkinson relinquished his appointment. On January 9, the appellant was brought before Major Littledale and relieved of his duties, remaining in open arrest. On January 19, the appellant was remanded for trial by Major Littledale on the two charges of stealing contained in a charge sheet signed on the same day by Brigadier Ray, commandant of the War Office Selection Board.

On January 22, a district court-martial assembled to try the appellant on the two charges. The appellant put forward a plea in bar of trial under rule 36 of the Rules of Procedure [1] on the ground that Major Littledale had condoned the offence by telling him to continue his duties while he was in open arrest. The court-martial, having heard the evidence, held that the offence had been condoned. By section 54 (6) of the Army Act,[2] the finding was subject to confirmation by the confirming officer. The finding, however, was not confirmed, and therefore under rule 36 (D) [1]

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[1] Rules of Procedure, r. 36: "(A) The accused at the time of his "general plea of 'Guilty' or 'Not "'Guilty' to a charge for an offence, "may offer a plea in bar of trial on "the ground that— . . . (ii) the "offence has been pardoned or con-"doned by competent military autho-"rity. . . (D) If the finding that a "plea in bar is proved is not con-"firmed, the court may be re-"assembled by the confirming autho-"rity, and proceed as if the plea had "been found not proved."

R. 56: "Whenever it appears that "a court-martial had jurisdiction to "try a person and make a finding "and that there is legal evidence "or a plea of guilty to justify such "finding, such finding and any "sentence which the court-martial "had jurisdiction to pass thereon "may be confirmed, and if so con-"firmed shall be valid, notwith-"standing any deviation from these "rules or notwithstanding that the "charge-sheet has not been signed by "the commanding officer or the con-"vening officer, provided that the "charges have, in fact, before trial "been approved by the commanding "officer and the convening officer, or "notwithstanding any defect or "objection, technical or other, unless "it appears that any injustice has "been done to the offender; but "nothing in this rule shall relieve an "officer from any responsibility for "any wilful or negligent disregard of "any of these rules."

R. 66: "(A) Where, in consequence "of anything arising while the court "is sitting, the court is unable by "reason of dissolution (as specified "in s. 53 of the Army Act, or other-"wise), or of the absence of the presi-"dent, to continue the trial, the "president, or in his absence, the "senior member present, will immedi-"ately report the facts to the con-"vening authority."

[2] Army Act, s. 54 (6): "Subject "to the provisions of this Act with "respect to the finding of acquittal, "the finding and sentence of a court-"martial shall not be valid except "in so far as the same may be con-"firmed by an authority authorized "to confirm the same."

S. 53: "(1) If a court-martial "after the commencement of the trial "is, by death or otherwise, reduced "below the legal minimum, it shall "be dissolved. (2) If after the com-"mencement of the trial the president "dies or is otherwise unable to attend, ". . . the convening authority may "appoint the senior member of the

the court-martial could have reassembled to hear the case as if the plea in bar had not been proved.

The matter went before the Directorate of Army Legal Services and, on February 2, a letter was written to the General Officer Commanding, Aldershot District, in which it was said: "It became apparent during the first hearing of this case on "January 22 that the charge sheet before the court was not "signed by the commanding officer of the accused, that is to "say, it was not signed by the camp commandant who was the "person who investigated the case and remanded the accused "for trial, but by Brigadier Ray, the commandant. It is a matter "for you whether you feel that this charge sheet is in order, but "you may well feel that the court would not have jurisdiction to "try the accused upon such a charge sheet, and the best course "would now be to dissolve the court at present in being "and convene a new court; it would also be necessary for a new "charge sheet to be made out and signed by the camp com-"mandant who should remand the accused upon it."

On February 6, the first court-martial was formally dissolved, although the provisions relating to dissolution contained in section 53 and rule 66 did not cover such a contingency. On February 12, a second court-martial was assembled to try the appellant on a new charge sheet containing the same charges of stealing public property, but signed by Major Littledale, the appellant's commanding officer. The appellant did not raise a plea in bar, but pleaded not guilty to both charges. He was found guilty of both, and sentenced to be reduced to the ranks. The conviction and sentence were subsequently confirmed.

The appellant appealed on the grounds that by virtue of rule 56 the proceedings before the first court-martial were valid and, therefore, the convening officer had no power to dissolve the first court-martial, and the proceedings before the second court-martial were null and void.

S. C. Silkin for the appellant. The point raised on this appeal is admittedly procedural, but is of importance because, it is submitted, a convening officer has no power to convene a new court while a previous court is adjourned. If it were open to a convening officer thus to convene another court, it would mean that he could

"court, . . . to be president, . . . but "if he is not of sufficient rank the "court shall be dissolved. (3) If, "on account of the illness of the "accused before the finding, it is "impossible to continue the trial, a "court-martial shall be dissolved."

do so if, e.g., he did not like the finding of the first court-martial. According to the Rules of Procedure it is sufficient if the commanding officer of the accused has in fact remanded him for trial; there is nothing to say that the commanding officer must sign the charge sheet, though his signature is evidence that he has remanded the accused. The first court-martial having been properly convened the second court-martial was a nullity. A court-martial may be dissolved on the grounds specified in section 53 of the Army Act. The joint effect of section 53 and rule 66 is that an accused person may be tried by a second court-martial where the first court has been dissolved for one of the reasons set out in section 53. Here the first court-martial was dissolved for a reason which was not one of those in the rules, namely, that the charge sheet was incorrectly signed, and therefore there was no power to convene the second court-martial.

E. Garth Moore for the Crown. The power to dissolve a court-martial is not contained exclusively in any enactment, but is an inherent power in the confirming or convening officer. The power to dissolve is part of the military common law: it has been exercised for many years, and particularly, e.g., where the court-martial has heard something prejudicial to the accused. Rule 66 states that "Where . . . the court is unable by reason of dissolution (as specified in section 53 of the Army Act, or otherwise) ". . . to continue the trial . . . ;" the words "or otherwise" are highly significant when it is remembered that there are no other sections or rules which deal with the question. Although section 53 makes specific provision for dissolution, the words "or otherwise" in rule 66 clearly show that there may be other occasions when dissolution is necessary. It would be against the interests of justice if a convening officer were unable to dissolve a court-martial except on the grounds set out in section 53.

If for any reason the sentence of a court-martial were not confirmed it would be extremely inconvenient, to say the least, if there were no power to dissolve, because then there would be two courts seized of the same matter. There is nothing to say that a convening officer shall not convene a second court-martial. At the time when the second court-martial was convened in the present case there was no valid finding, since the finding of condonation had not been confirmed.

With regard to the signing of the charge sheet, it was not strictly necessary for the commanding officer to sign it. The confirming officer could have overlooked the defect in the charge sheet by virtue of rule 56. Rule 56 might in fact be prayed in aid to validate the confirmation of the finding of the second court-martial.

S. C. Silkin, in reply. Rule 56 could not be prayed in aid in respect of the confirmation of the finding of the second court-martial, because the court-martial must have jurisdiction for the rule to be invoked. If the first court-martial was dissolved for reasons other than the proper ones, then the second court-martial had no jurisdiction and rule 56 does not apply.

[LORD GODDARD C.J. We will now assume that the second court-martial was valid and hear you on condonation.]

Condonation means such conduct on the part of a competent authority as is inconsistent with the subsequent trial of the offender and makes it inequitable that he should be tried.

[LORD GODDARD C.J. How can one condone an offence if one keeps the man under arrest?]

In many cases of condonation the man is under arrest. The important point is whether the action of the commanding officer was such as to indicate to the accused that, whatever other people might think, the superior military authority was prepared to trust him with the continuance of his duties. The commanding officer could not have shown his trust in the appellant more clearly than by putting him back in charge of the cook-house. There was evidence which entitled the first court-martial to find condonation, and, since the court-martial is a tribunal of fact, it matters not whether the confirming officer came to a different conclusion. If there was some evidence on which the court could find condonation, then the non-confirmation of their finding was wrong.

LORD GODDARD C.J., delivering the judgment of the court, stated the facts and the relevant statutory provisions and continued: There is nothing that the court can find, nor has our attention been called to any provision of the Army Act or of the Rules of Procedure, which requires the charge sheet to be signed by the commanding officer, except that in the form which is in the schedule to the Rules of Procedure there is a place for the signature of the commanding officer, which appears to the court to indicate that the commanding officer has remanded the accused for trial.

It is clear that the point which was raised by the Directorate of Army Legal Services seems to be one which was really immaterial. If the first court-martial had proceeded, rule 56 would have prevented any question arising with regard to the fact that the form had not been signed by the commanding officer, because it is clear that no injustice had been done to the accused, and the court-martial could have proceeded with the trial in the ordinary way because, if the finding is not confirmed then, by reason of rule 36 (D), the court-martial would have continued to deal with the case and the accused would have been called on to plead guilty or not guilty to the offence. If he had pleaded not guilty, the trial would have continued but, on account of the letter which the General Officer Commanding Aldershot District, received, it was ordered that the court-martial should be dissolved, and that a further hearing should take place before another court-martial. It is to be observed here that the finding of a court-martial is of no validity until it has been confirmed, and therefore the court-martial's finding that the plea in bar was good and that the offence had been condoned was of no validity as it had not been confirmed. The fact that that finding had not been confirmed did not, of course, amount to an acquittal; it simply amounted to an expression of opinion that the court-martial was dissolved and that if it had not been dissolved it would have been able to continue the hearing of the charges. There had been no decision on anything except the decision of the confirming officer that the plea in bar was not proved. It is clear that the proceedings of a court-martial are not completed until the finding has been confirmed or not confirmed as the case may be.

Accordingly, a second court-martial was convened to try the accused, and it was that court-martial which found him guilty on the two charges. So far as that finding is concerned, the court sees no ground whatever on which they can differ from the finding of fact that he was guilty of the two offences with which he was charged, but it was argued that there was no power to dissolve the first court-martial before it reached a decision, and a fortiori no power to direct a trial before another court-martial. It is curious, no doubt, that there is no express power of dissolution given by the Army Act or the Rules of Procedure except insofar as the matter is dealt with by section 53 of the Army Act, which provides that a court-martial shall be dissolved in certain circumstances, that is, compendiously, if the president dies or members of the court die or cannot attend and the court is reduced below its legal minimum, or if on account of the illness of the accused it is impossible to continue the trial. In those circumstances, the court-martial shall be dissolved, but there is no other provision with regard to the dissolution of a court-martial.

Of course, rule 66 does not apply to such a case as this, because if the convening authority has dissolved the court there is no necessity to report to the court that the authority has dissolved it; but Mr. Garth Moore has contended that on what he compendiously called the common law of the Army, there is always power to dissolve a court-martial. It might be said that there could not be such a power because that would enable the convening authority, if they thought that the court-martial was not taking a view of the case which commended itself to the convening authority, to dissolve the court-martial and appoint another court. We cannot and do not assume that a convening authority would ever act as improperly as that, and no doubt if they did, proper disciplinary action would be taken and the matter raised in Parliament. It is clear here that considering that the court-martial is to some extent like a bench of magistrates, both judges of law and fact, it might be most prejudicial to soldiers if the convening authority had not power on a proper occasion to dissolve the court-martial and order proceedings before another court. For instance, if during the hearing of the case some matter highly prejudicial to the prisoner emerged, or if evidence was wrongly received and it came to the knowledge of the convening authority that that evidence had been wrongly received, or if evidence of bad character which ought not to have been given was admitted against an accused person, it would be highly prejudicial and wrong that that court-martial should proceed. The only course then would be to dissolve the court-martial and have the accused re-tried before another court.

In fact, the position is exactly the same as happens in the civil courts where, during the course of a trial, something occurs which in the opinion of the presiding judge is so prejudicial to the prisoner that the only proper course is to discharge the jury and begin the case over again. I suppose that there are three or four cases a year in which a matter of that sort arises. During a prisoner's cross-examination or during the evidence of a police officer, owing to an unguarded question or an unguarded answer the fact that a prisoner has previous convictions is brought out in court, and thereupon, as has often been said in the Court of Criminal Appeal, the right course in those circumstances is for the judge to stop the trial, discharge the jury and begin over again. There is no statute which permits the court to do that, but it is a power which the court has always assumed, and it is a power which it is necessary in the interests of justice that the court should have. There is no question now that the court has that power, and it is a power which the court constantly uses.

For the same reason, it is clear that the convening authority must have power to dissolve a court-martial if they consider that the proceedings are in some way irregular or that matters have arisen which are prejudicial to the accused. If, after all these years, we were to hold now, and we are told—and I have no doubt it is true—that it has always been assumed that there is this power, that the convening authority had no such power and that once a court-martial is in existence although it has to come to no decision it must continue to be in existence, it is obvious that very great prejudice might be caused to accused persons for which there would be no remedy. We are, therefore, of opinion that it was within the power of the convening authority to dissolve this court-martial and order the trial before another one, although we think that the technical point which was taken by the Directorate of Army Legal Services had no substance in it. The fact that this document had not been signed by the commanding officer was not a defect which was in any way fatal and, as I have already pointed out, rule 56 would have afforded an answer if any question had afterwards been raised. As I have already said, no objection was taken by the accused person to being tried by this court-martial. Therefore, we think that there was no necessity to dissolve the court-martial, but we cannot doubt that the convening authority had power to dissolve it if it seemed fit. Therefore, there is no objection here to the fact that the case was brought after the plea in bar had been disallowed, and there is no objection to the fact that another court-martial was assembled to try the general issue. Of course, this power of dissolving the court-martial could not be exercised if the court-martial had once come to a decision, but where they had come to no decision there can be no objection as far as this court can see.

When the case came before the second court-martial, the accused did not put forward the plea in bar again, and it is quite understandable why he did not do so, because once the plea in bar had been disallowed by the confirming authority it would have been idle for him to put forward the plea again at the second hearing. But the facts of the case were before this court, and if the court thought that the plea in bar ought to have succeeded on the first hearing, that is to say, the confirming officer was wrong in quashing or not confirming the plea in bar, this court would not hesitate to allow the point to be raised and argued before this court.

The question is whether there was condonation. The condonation which is suggested here is that when Major Littledale ordered the accused out of close arrest into open arrest he ordered a summary of evidence to be taken, and told him to resume his duties in the cook-house; that, it was said, meant condonation. But the court cannot see here any evidence on which it can possibly be said that Major Littledale, who was the only person who could have condoned this offence, in any way did so. Condonation means a wiping out or forgiveness of the offence in some way. The passage from Clode's Military Forces of the Crown ((1869) Vol. 1, p. 173), to which our attention was called, states: " 'When any offence has been committed by an officer " 'or soldier, and that offence not punished or forgiven, but " 'advisedly overlooked, the person implicated being continued in " 'his employment—these circumstances are held to be a good " 'plea of condonation and a bar to further proceedings.' "

In this case the accused was informed that he was to remain in open arrest, that a summary of evidence would be taken and that he was to continue his duties meanwhile. How can that be said to be a condonation of an offence of which Major Littledale, who had only just arrived at the camp, could not have had any knowledge? It is difficult to understand how one can condone an offence until one knows that an offence has been committed, and in this case, as there was no summary of evidence at the time Major Littledale took the steps with regard to this man, it seems to the court that there was no evidence on which the first court-martial could find condonation. Therefore, the decision of the confirming officer was right in refusing to confirm the finding. In these circumstances, the plea of condonation could not have been successfully raised at the second trial, and as there is no other ground on which it is suggested that the proceedings were in any way wrong, and as it is not for this court to examine the evidence whether this man stole the property or not—it does not seem to have been seriously contested before the second court-martial—this appeal is dismissed.

Appeal dismissed.

Solicitors: *Directorate of Army Legal Services; Registrar of the Courts-Martial Appeal Court.*

1953
May 14,
15, 22.

Pilcher J.

LEOLGA COMPANIA DE NAVIGACION *v.* JOHN GLYNN & SON LD.

Shipping — Charterparty — Conveyance of "lawful merchandise" — Meaning.

Where a term of a charterparty states that a ship is to be employed only for the conveyance of lawful merchandise, cargo loaded on the ship must not only be such as can be loaded without breach of the law in force at the port of loading, but must also be capable of being lawfully discharged at the port where the charterers order it to be unloaded.

Scrutton on Charterparties (15th ed., p. 156) and Carver's Carriage of Goods by Sea (9th ed., p. 454) commented upon.

Vanderspar & Co. v. *Duncan & Co.* (1891) 8 T.L.R. 30 is no authority for the proposition that government stores, including ammunition, are not covered by the words "lawful merchandise"; at the most the case is only an authority on usage applied to its own particular facts.

SPECIAL CASE stated by an umpire.

The Leolga Compania de Navigacion, the owners of the s.s. *Dodecanese*, claimed in an arbitration against John Glynn & Son Ld., time-charterers of the vessel, £2,131 12s. 11d., being the amount of hire for the vessel during a period when it was immobilized, or alternatively, the same amount as damages for breach of the charterparty.

The following statement of facts is taken from the judgment of Pilcher J.: By a time charterparty dated December 12, 1951, on the Baltime 1920 form, extending over a period which in the result proved to be rather over three months, the s.s. *Dodecanese* was delivered to the charterers at Malta on December 20, 1951, and ultimately redelivered to the owners at Tripoli on April 1, 1952.

The charterparty contained the following material clauses: clause 1: ". . . steamer to be employed in lawful trades for the "conveyance of lawful merchandise between good and safe ports "or places within" certain limits. Clause 10: "In the event "of loss of time caused by drydocking or by other necessary "measures to maintain the efficiency of steamer . . . breakdown "of machinery, damage to hull or other accident preventing "the working of the steamer and lasting more than twenty-four "consecutive hours, hire to cease from commencement of such

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[Reported by Miss C. J. ELLIS, Barrister-at-Law.]

"loss of time until steamer is again in efficient state to resume "service. . . ." Clause 12: ". . . Charterers to be responsible "for loss or damage caused to steamer or owners by goods being "loaded contrary to the terms of this charter. . . ." Clause 31: "In the event of explosives being shipped it is agreed that "charterers are to supply at their expense the necessary "magazine in order to comply with Board of Trade regulations." Clause 38: "Dangerous cargo may be carried in accordance with "Board of Trade Rules. If gas ejectors are required same to be "supplied and fitted at charterers' expense and to be operated by "ship's personnel."

Having been delivered to the charterers under the charterparty at Malta on December 20, 1951, the vessel loaded cargo at Malta, Tripoli, Benghazi and Tobruk. Some, if not all, of the cargo consisted of ammunition and other explosive war stores.

The vessel arrived at Port Said at 4 a.m. on January 14. She was there boarded by the Egyptian authorities, who made an entry in Arabic in her log-book that she was "black-listed" according to Egyptian law.

On November 1, 1951, and before the vessel entered on the charter, the Egyptian authorities had issued a letter, which was sent to the charterers' agent, the effect of which was stated in paragraph 8A of the special case, as follows: "On November 1, "1951, the Egyptian authorities issued a letter No. 9443, which "letter stated, inter alia, that any cargo or materials consigned "to the British Forces in Egypt were not allowed to be discharged "without obtaining special permission from the customs, and "that it was prohibited for vessels to berth for discharge and/or "loading cargoes belonging to the British Army at any place in "Egypt except the ports of Alexandria, Port Said and Suez. . . ."

The cargo on board the vessel was consigned to Adabiya, in Suez Bay at the southern end of the Suez Canal. The vessel proceeded through the Canal and arrived at Adabiya, where she discharged her cargo. Discharge was completed on January 24. On that day she commenced to load a cargo of military stores, including ammunition, for Aquaba. Loading was completed on January 30, and the vessel was due to sail for Aquaba on January 31. On the afternoon of January 30, however, she suffered a breakdown of her propelling machinery, which effectively immobilized her until it could be repaired. On February 4 the charterers' agents notified the master by letter that his ship must, in the circumstances, be considered as "off-hire" from the afternoon of January 31.

The nature of the machinery breakdown necessitated the renewal of a phosphor bronze block. Owing to the fact that the vessel had been black-listed by the Egyptian authorities, the latter refused to allow the necessary repair to, or renewal of, the phosphor bronze block to be effected on the spot. The master of the vessel, however, apparently succeeded in getting the defective part taken to Cairo, where a new block was made. That was brought back to the ship and installed in position, but it was not until 9 p.m. on March 1 that the vessel was once again in an efficient state to resume service under the charterparty. She was thus delayed in all about thirty days.

The following relevant paragraphs were set out in the special case: "5. The Egyptian authorities refused to allow any repairs "to be done owing to the fact that as the vessel had carried "military stores for the British Forces in Egypt she had been "black-listed. The master, in an endeavour to minimize the "delay had, in fact, managed to get repairs effected to the part "at Cairo. 6. The claimants' claim is for £2,131 12s. 11d., "being the amount of hire from noon on January 31 to 9.0 p.m. "on March 1, 1952, less hire for four days conceded by claimants "as representing the time which would normally have been "spent in effecting repairs and certain other items, all of which "have been taken into account. These figures, as figures, have "been agreed between the two parties. The claimants put in "an alternative claim for damages which amounts to the same "figure as I have just stated. 7. This case turns upon the "question as to who is responsible for the time used doing "repairs, which repairs were inordinately delayed on account of "the vessel being black-listed by the Egyptian authorities owing "to her having or having had on board military stores, cartridges, "bombs, shells, etc., for the British Forces in Egypt."

Subject to the opinion of the court, the umpire held, as stated in paragraph 8E of the case, that the charterers were in breach of contract, since in *Vanderspar & Co.* v. *Duncan & Co.*[1] it was held by Charles J. that government stores (armaments, ammunition, etc.) were not covered by the words "lawful merchandise," and he awarded and adjudged that the claimants were entitled to recover from the charterers the sum of £2,131 12s. 11d.

In paragraph 8F of the case it was stated that the question for the decision of the court was whether on the facts found and the true construction of the charterparty the claimants were entitled to that sum.

[1] (1891) 8 T.L.R. 30.

1953

LEOLGA COMPANIA DE NAVIGACION
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JOHN GLYNN & SON LD.

Eustace Roskill Q.C. and *A. Bateson* for the charterers. The case raises three questions: first, was the vessel off-hire under clause 10 of the charterparty? Secondly, if the vessel was off-hire, can the owners recover the loss of hire as damages for breach of contract? Thirdly, if there was a breach—it is submitted that there was not—does the loss of hire flow from that breach?

The vessel was clearly off-hire at the material time. The onus is on the charterers to prove that hire is not payable: *Sea and Land Securities Ld.* v. *W. Dickinson & Co. Ld.*[2] On the facts set out in the case the charterers have clearly brought themselves within the off-hire clause and so discharged that burden of proof.

The umpire has found as a matter of law that the cargo was not "lawful merchandise," but he has not found as a fact whether it was the first cargo that was discharged or the one which was subsequently loaded that was unlawful. There is also no evidence as to what was meant by black-listing, nor whether the black-listing was an effective bar to having the repairs done. There is also no finding that the vessel actually broke the Egyptian law. The umpire's holding in paragraph 8E of the case amounts to an error in law on the face of it. *Vanderspar & Co.* v. *Duncan & Co.*,[3] on which the umpire based his opinion, is not authority for saying that government stores are not "lawful merchandise." That case, so far as it decided anything, is only authority on usage but not on construction. "Lawful merchandise" has never been defined judicially; it must be construed in accordance with the terms of the charterparty. The Oxford Dictionary gives "merchandise" two meanings the first is inapplicable, the second is "The commodities of commerce; movables which are "or may be bought and sold." That definition is justification for saying that "merchandise" alone has the widest meaning. Here it is restricted by the addition of "lawful," and the highest that it can be put is that the merchandise must be lawful according to the law of the port of shipment. In Scrutton on Charterparties (15th ed., p. 156) it is stated: "Lawful merchandise = goods "ordinarily shipped from the port of shipment." As authority for that statement *Vanderspar & Co.* v. *Duncan & Co.*[3] is cited. It is doubtful whether that case is authority for the statement. In Carver's Carriage of Goods by Sea (9th ed., p. 454) the same case is cited as authority for saying that government stores have been held to be not covered by "lawful merchandise." That view, too, it is submitted, is incorrect. Even if the textbooks are correct, however, it is clear, in view of clauses 31 and 38 of the charterparty, that both parties contemplated the shipment of bombs and ammunition, and that narrow ground would suffice to decide the point in favour of the charterers.

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[2] [1942] 2 K.B. 65; 58 T.L.R. 210; [1942] 1 All E.R. 503.

[3] 8 T.L.R. 30.

If the submission that there was no breach of the charterparty is correct, then no further question arises, but on the assumption that the cargo was unlawful the next question is whether the alleged breach of contract caused the loss of hire. Prima facie, the stoppage did not result from the failure to load within the trading limits. The protracted delay caused by the refusal of repair facilities due to the ship being black-listed could not have been reasonably foreseen by the parties as damage flowing naturally and directly from unloading the cargo: *Mehmet Dogan Bey* v. *G. G. Abdeni & Co. Ld.*[4] As the damage was not reasonably foreseeable the owners are entitled only to nominal damages: *Andre et Cie, S.A.* v. *J. H. Vantol Ld.*[5]

Sir Robert Aske Q.C. and *Michael Holman* for the shipowners. It has been conceded by the charterers that a covenant in a charterparty to pay hire applies throughout the charter unless the charterers can show that the vessel has been put off-hire under an express provision in the charterparty. The only clause relied on by the charterers is clause 10. The shipowners have conceded that the vessel was off-hire for four days—the normal time that it would have taken for the breakdown to be remedied—but not for the extra twenty-six days during which the ship was held up waiting for the spare part. The umpire has stated that the cause of the delay was due to the action of the Egyptian authorities in refusing to allow repairs to be done as the ship had been black-listed; the court is bound by that finding: *Royal Greek Government* v. *Minister of Transport.*[6] If that submission be wrong, and the vessel was off-hire, then there was a breach of contract; that depends on the meaning of the words "lawful "merchandise." Government stores cannot be merchandise at all. "Merchandise" means goods ordinarily dealt with by merchants; it connotes dealings between merchants. Ordnance stores are not the subject of merchanting; they are the possessions of a State. It is not suggested that this case is governed by *Vanderspar & Co.* v. *Duncan & Co.*,[7] which was decided by Charles J. on the evidence of usage. Whether that usage has been incorporated into a legal principle by the passage of time is a different matter.

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[4] [1951] 2 K.B. 405; [1951] 2 T.L.R. 30; [1951] 2 All E.R. 162.

[5] [1952] 2 Lloyd's Rep. 282.

[6] (1950) 66 T.L.R. (Pt. 1) 504.

[7] 8 T.L.R. 30.

It is apparently considered so in Scrutton on Charterparties. It cannot be said that the same goods in all circumstances would be lawful merchandise; they might not be merchandise at all: *Potter* v. *New Zealand Shipping Co.*[8]; *Capper* v. *Forster.*[9]

The next point is whether, if this was merchandise, it was lawful. The construction contended for by the charterers is impossible. The object of such a clause is to protect the ship and to prevent it from being prejudiced. Therefore it must be lawful not only at the port of loading but throughout the carriage, and in particular at the port of discharge. Since the Egyptian Government by an express ordinance, which the umpire has accepted as Egyptian law and has set out in paragraph 8A, have prohibited the cargo from being discharged at any port in Egypt except the specified ports, the merchandise cannot be lawful.

[PILCHER J. The award is wrong on the face of it because it is clear that the umpire relied on *Vanderspar & Co.* v. *Duncan & Co.*[10] Even if he came to the right conclusion he did so for the wrong reason.]

[*Roskill Q.C.* If the shipowners' contention that the vessel was not off-hire is wrong, then nothing further arises, because the only alternative claim was based on the "lawful merchandise" point on which the umpire wrongly decided the case.]

Sir Robert Aske Q.C. Where, as here, a case is left in an open form, as set out in paragraph 8F, then any argument is open to both parties, and it matters not whether the points were taken before the arbitrator or not. Any point is open to the parties arising on the facts set out in the case: *Hudson's Bay Co.* v. *Domingo Mumbru S.A.*[11]

With regard to the charterers' third point on damages, damages are a question of fact, and the umpire need not set out the facts on which he assesses the damages: *Temple Steamship Co. Ld.* v. *V/O Sovfracht.*[12] He should only set out those facts where he is asked to state a case on remoteness of damage: *Mehmet Dogan Bey* v. *G. G. Abdeni & Co. Ld.*[13] and *André et Cie, S.A.* v. *J. H. Vantol Ld.*[14]

There were two possible causes for the delay, the breakdown of the engines and the action of the Egyptian authorities. It is conceded that the vessel was off-hire for four days due to the breakdown, but the extra twenty-six days during which the ship

[8] (1895) 1 Com.Cas. 114.

[9] (1837) 3 Bing.N.C. 938.

[10] 8 T.L.R. 30.

[11] (1922) 10 Ll.L.Rep. 476.

[12] (1945) 79 Ll.L.Rep. 1.

[13] [1951] 2 K.B. 405.

[14] [1952] 2 Ll.Rep. 282.

was immobilized was not caused by any of the matters which put the ship off-hire, but by the action of the Egyptian authorities. The question for the umpire was which was the effective cause, and he found that it was the act of the Egyptian authorities. [Reference was also made to *Board of Trade* v. *Temperley Steam Shipping Co. Ld.*[15]]

Roskill Q.C., in reply. There is nothing novel in the conception of two causes for one period of immobilization. By attempting to subdivide the period by saying that four days were due to the breakdown and twenty-six days due to abnormality of extraneous circumstances, counsel for the shipowners is confusing cause and effect, the cause of the immobilization and the cause of the prolongation. *Board of Trade* v. *Temperley Steam Shipping Co. Ld.*[15] and the present case are indistinguishable in principle. On the findings of fact in the case there are all the requisites necessary for off-hire: *Hogarth* v. *Miller, Brother & Co.*[16] Once there is a breakdown, the hire does not begin again until the ship is repaired. It matters not if an intervening cause prolongs the immobilization.

On the question whether any further argument apart from the point of *Vanderspar & Co.* v. *Duncan & Co.*[17] is open to the shipowners, the test always is whether further findings of fact would have been required: *Balkans and Near East Shipping Agency* v. *United Shipping Agencies Ld.*[18] and *Tatem Steam Navigation Co. Ld.* v. *Anglo-Canadian Shipping Co. Ld.*,[19] in both of which the *Hudson's Bay* case [20] was cited. A new point of law must not be taken if in order to argue it further facts are required: *Minister of Food* v. *Reardon Smith Line Ld.*[21] The point regarding the meaning of "lawful" is not open to the shipowners because its determination would require further findings of fact. If that is wrong, then it is submitted that there is no evidence that the carrying of the cargo was unlawful in Egypt. The maxim that everyone is presumed to know the law does not apply to foreign law, which is a question of fact.

On the question of damages, the way in which the damages were worked out was on the basis of the hire, which appears on the face of the award. That loss cannot naturally flow from the alleged breach of the charterparty.

Cur. adv. vult.

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[15] (1927) 27 Ll.L.Rep. 230.
[16] [1891] A.C. 48; 7 T.L.R. 120.
[17] 8 T.L.R. 30.
[18] (1935) 53 Ll.L.Rep. 180.
[19] (1935) 53 Ll.L.Rep. 161.
[20] 10 Ll.L.Rep. 476.
[21] [1951] 2 T.L.R. 1158.

May 22. PILCHER J. stated the facts set out above and continued: One of the difficulties in the case arises from the fact that the umpire has not set out some of the facts of the case with any great precision. On the face of the award, in paragraph 8E, the umpire, taking the view, on the authority of *Vanderspar & Co.* v. *Duncan & Co.*,[1] that government stores (ammunition, etc.) were not lawful merchandise, has found, subject to the opinion of the court, that the charterers committed a breach of contract. He has assessed the damages payable by the charterers in respect of the breach of contract on the basis of the hire payable by them, but withheld, throughout the period during which the vessel was delayed, namely, thirty days, less four days, which was agreed by the parties as being the time in which the repairs to the defective part would have been effected but for the refusal of the Egyptian authorities to allow repairs to be done.

Another difficulty in the case has arisen because of the umpire's reference in paragraph 8E of the case to *Vanderspar & Co.* v. *Duncan & Co.*[1] It was urged with some force by Mr. Roskill, on behalf of the charterers, that this case is no authority for the bald proposition that government stores, including ammunition, are not covered by the words "lawful merchandise." This was conceded by Sir Robert Aske for the shipowners. In my view, it is clear that *Vanderspar & Co.* v. *Duncan & Co.*[1] is no authority for the proposition for which it would appear, on the face of the award, that it was invoked by the umpire. The report of the case is not satisfactory, and at the most the case is only an authority on "usage" applied to its own particular facts.

In these circumstances, the charterers contend that the award is bad on its face and should be set aside. Sir Robert Aske, for the shipowners, pointed out, however, that in paragraph 8F the umpire states the question for the decision of the court in the widest possible terms: namely, whether on the facts and the construction of the charterparty the claimants are, or are not, entitled to the damages which he has awarded them.

Sir Robert Aske contended that on the wide question submitted it was open to this court, if the necessary facts have been found by the umpire, to consider not only whether there has been a breach of contract by the charterers on the grounds found by the umpire, but whether on the facts found the charterers have been guilty of any breach of contract at all which entitles the shipowners to claim damages.

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[1] 8 T.L.R. 30.

On the broad question submitted for the opinion of the court I have no doubt that if sufficient facts had been stated by the umpire to enable the court to arrive at a conclusion, it is open to me to consider whether the charterers have, in the circumstances, been guilty of any breach of the charterparty, and, if necessary, also to consider the question which is necessarily bound up with the point, namely, whether the charterers were entitled, in the circumstances, to treat the vessel as off-hire and to withhold hire under the off-hire clause.

In this connexion I need only refer to certain passages in the judgments of Bankes and Atkin L.JJ. in *Hudson's Bay Co.* v. *Domingo Mumbru S.A.*[2] The point, or one of the points, in the case being whether or not it was open to the parties, on the statement by the umpire of the question for the decision of the court, to argue a point which apparently had not been dealt with or decided by the umpire, Bankes L.J. said[3]: "... "the special case takes the form that the umpire states the facts "as he finds them, and then asks the court not a question as to "a specific point of law, but he asks the court generally to say "whether having regard to those facts as found by him the one "party or the other was in the right. So I think it was open to "the shipowner to raise the point."

Atkin L.J. said[4]: "Now the first question is: is that open "to them? For the reasons given by my Lord, I think that that "point is open to them, though, in fact, it was not taken before "the umpire where apparently the arbitration seems to have "been conducted before two arbitrators and the umpire, and "we are not told whether legal advisers were present or not. It "seems to me that, where an umpire states a case in the form "that subject to any questions of law he finds the facts so-and-"so, and awards so-and-so, the parties are entitled to take any "questions of law that arise upon those facts; and I think it is "a good thing that that should be made clear. I am not at all "sure that by far the most important part of our decision in this "case to the public at large is that part of the decision and not "that part that immediately concerns the construction of this "charterparty."

In common parlance, the real point in this case is very shortly summarized by the umpire in paragraph 7 of the award. [His Lordship read paragraph 7 set out above, and continued:] I start with this general proposition, that prima facie the charterers' obligation to pay hire is continuous. If a charterer withholds hire, purporting to do so under the off-hire clause, it is for him to establish facts which entitle him to do so: see *Board of Trade* v. *Temperley Steam Shipping Co. Ld.*[5] Correspondingly, if the shipowner alleges a breach of contract he must prove it.

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[2] 10 Ll.L.Rep. 476.

[3] Ibid. 478.

[4] Ibid.

In the present case the charterers allege that the vessel was off-hire within the words of clause 10 of the charterparty throughout the whole month during which she was held up at Adabiya, and they deny that they have been guilty of any breach of contract. They further say that if they have been guilty of any breach of the charterparty the damages recoverable are only nominal in that the fact that the Egyptian authorities might refuse repair facilities to the ship was not a matter which was foreseen or foreseeable by the parties.

The first matter which I have to consider is: what are the material facts found by the umpire? I take the findings of fact to be that the vessel, loaded with war stores, was boarded in Port Said on January 14, 1952, by the Egyptian authorities, who "made an entry in Arabic in the log-book that the vessel was "black-listed according to Egyptian law." I take paragraph 5 of the award to be a finding of fact that after the breakdown the Egyptian authorities refused to allow any repairs to be done owing to the fact that as the vessel had carried military stores for the British Forces in Egypt she had been "black-listed." The vessel was in fact delayed about thirty days, and I assume from paragraph 6 of the award that it was agreed that but for what I will call the action of the Egyptian authorities the vessel would have been delayed as a result of the breakdown of her machinery for only four days instead of thirty days. It is also clear from this paragraph that the sum of £2,131 12s. 11d. was agreed by the parties as a figure, after taking all proper matters into account, representing the hire to which the shipowners were entitled if the vessel was not, as the charterers alleged, off-hire during the difference between four and thirty days: namely, twenty-six days.

Under clause 10 of the charterparty it is only loss of time caused, inter alia, by breakdown of machinery, which enables the charterers after twenty-four hours to put the vessel off-hire. There is no doubt that the s.s. *Dodecanese*, having become physically immobilized by the breakdown, remained so physically immobilized for thirty days, and clause 10 provides that hire shall cease from the moment of the loss of time until the vessel again is in an efficient state to resume service. This did not occur until the end of the thirty days. The umpire has found this clearly in his award. He has not dealt with the shipowners' first claim, which was for loss of hire withheld during the whole period by the charterers, but finding that the latter were in breach of the charterparty for a reason which no one now seeks to support, he has awarded the shipowners damages based on the rate of the charter hire for the period by which the delay to the vessel was prolonged by the action of the Egyptian authorities in refusing repair facilities.

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[5] 27 Ll.L.Rep. 230.

It is, I think, clear from the passages in the award to which I have referred that the umpire found as a fact that some twenty-six days of the delay which the vessel incurred was due to what I will continue for the moment to call the action of the Egyptian authorities in refusing repair facilities. He found as a fact that this action was taken by them because the vessel had been black-listed by the Egyptian authorities because she had carried military stores for the British Forces in Egypt. What he does not find as a fact is that there was any Egyptian law entitling the Egyptian authorities to black-list the vessel; nor what black-listing entailed; nor whether the Egyptian authorities had any right under Egyptian law to refuse repair facilities to a vessel which they had black-listed. He does find in paragraph 8B of the award that the charterers' agents and the charterers had notice of the contents of letter No. 9443 before the vessel entered on the charter and "were aware of this embargo" before any cargo was loaded on the vessel, whereas there was no evidence that the charterers brought that letter to the notice of the master of the vessel until January 14, which was the day the vessel entered the Canal and the day she was black-listed.

I think that it would be right that I should assume that wherever in his award the umpire refers to "the Egyptian "authorities" he means the officials of the Egyptian government charged with the administration of Egyptian law.

In these circumstances, the shipowners contend that the charterers, who were under the charterparty the masters of the vessel's trading activities, deliberately sent the vessel loaded with war stores destined for the British Forces in Egypt into the Suez Canal and caused her to discharge this cargo at Adabiya, which was a port in Egypt where the loading and discharge of such cargo was, to their knowledge, prohibited by the terms of the letter referred to. In so doing the owners contend that the charterers were in breach of one of the terms of the charterparty inserted for the protection of the owners: " . . . steamer to be "employed in lawful trades for the conveyance of lawful mer-"chandise." They also point to clause 12 of the charterparty, which provides that the charterers shall "be responsible for loss "or damage caused to steamer or owners by goods being loaded "contrary to the terms of this charter."

On behalf of the shipowners Sir Robert Aske contended that ordnance stores and munitions carried by the vessel were not "merchandise" at all, because they were British Government property and were not "commodities of commerce"; that is to say, goods ordinarily dealt in by merchants. In a charterparty of this kind, in which the carriage of explosives and dangerous cargoes is specifically permitted subject to Board of Trade rules and regulations, I think that this submission is too wide. Whether in the particular circumstances of the case the cargo carried was "lawful merchandise" is another matter. Before they entered on the charterparty the charterers had received letter No. 9443, to which I have already referred, and must be taken to have known that the Egyptian authorities had prohibited vessels from discharging or loading cargoes belonging to the British Army at Adabiya. In spite of this they caused or permitted the vessel to berth for the purpose of discharging and to discharge her cargo of ammunition, etc., at Adabiya, and while there is no specific finding by the umpire that this cargo belonged to "the British "Forces in Egypt," I think that it would be proper for me to infer this fact from this and other facts found in the award rather than to remit the award to the umpire for a specific finding on this point alone.

There is very little authority on the point as to what in any given circumstances constitutes "lawful merchandise." In Scrutton on Charterparties (15th ed., p. 156) there is this very short passage: "Lawful Merchandise = goods ordinarily shipped "from the port of shipment." Then there is a reference to *Vanderspar & Co.* v. *Duncan & Co.*[6] I am told that that short passage is of some standing in the book, and that it was already there when the author himself was responsible for what was contained in the book.

In Carver's Carriage of Goods by Sea (9th ed., p. 454), under the heading "Goods that may be loaded," there is this passage: "'Merchandise' and 'produce.'—General expressions,

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[6] 8 T.L.R. 30

"such as 'merchandise,' or 'produce,' used to describe the "intended cargo, denote things which have those characters in "the particular trade, having regard especially to the particular "port of loading. 'Produce' has been said to mean 'anything "'produced by the country in the neighbourhood of the port "'of loading, and being an ordinary subject of importation.' "Government stores (ordnance, ammunition, etc.) have been "held to be not covered by 'lawful merchandise'"; and once again there is a reference to *Vanderspar & Co.* v. *Duncan & Co.*[6] If I may say so, it seems more than doubtful whether the case is an authority for the proposition for which it is cited.

It is clear that if any real meaning is to be given to the words "lawful merchandise," which are, of course, inserted into the charterparty for the protection of the owners, the goods loaded must be such as can be loaded without breach of the law in force at the port of loading. Inasmuch as the master is under the general orders of the charterer as to where a cargo shall be carried within the charter limits, it is at least logical to suppose that the charterer undertakes that the cargo shall also be the type of cargo which can be lawfully carried and discharged at the port to which he has ordered the vessel to proceed. The purpose of the provision that only "lawful merchandise" shall be carried by the charterers would be largely nullified if all that was necessary was that the cargo could be loaded without breaking the laws of the country where it was loaded.

I was referred to *Capper* v. *Forster*,[7] and also to *Potter* v. *New Zealand Shipping Co.*[8] Neither of these cases, however, assist me in the determination of what is meant by the words "lawful merchandise."

Egypt is a sovereign State, and the principal difficulty which I have found in this case is whether I am able to spell out from the facts found by the umpire a finding of fact that the Egyptian law was as stated in letter No. 9443. The umpire finds as a fact that the Egyptian authorities issued this letter, and that the charterers had knowledge of its contents before the cargo was loaded. The letter no doubt constitutes some evidence of what the Egyptian law was at the material time. Egyptian law, for the umpire, was a question of fact. I have little doubt that the umpire was satisfied on the evidence of letter No. 9443 that the Egyptian law was as stated in the letter, and he accordingly stated the purport of the letter in paragraph 8 of his award, to which the preface is: "Upon these contentions I find the "following further facts. . . ." I accordingly infer that the umpire has found that the letter in question stated accurately the effect of Egyptian law. If this be so, the cargo was one which the charterers knew, or ought to have known, before they loaded it, could not be discharged at Adabiya without breaking Egyptian law. The cargo was discharged at Adabiya, and it was not until after that was done that the Egyptian authorities took any active step against the vessel by refusing her repair facilities. The cargo was destined for Adabiya, and in causing it to be discharged there the charterers disregarded the prohibition in letter No. 9443 which, in my opinion, the umpire has found to be an accurate statement of Egyptian law. If the cargo could not lawfully be discharged at the port where the charterers ordered it to be discharged, it was not, in my opinion, lawful merchandise.

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[6] 8 T.L.R. 30.

[7] 3 Bing.N.C. 938.

[8] 1 Com.Cas. 114.

The umpire has found as a fact—and I quote from paragraph 5 of the award—"The Egyptian authorities refused to allow any "repairs to be done owing to the fact that as the vessel had "carried military stores for the British Forces in Egypt she had "been black-listed." He has found the total period of delay, and it was agreed by the parties that the repairs to the engine breakdown would only have taken four days but for the intervention of the Egyptian authorities.

In my view, for the reasons which I have set out, the umpire was right in finding that the charterers committed a breach of the charterparty in that they failed in all the circumstances to load the vessel with lawful merchandise, but wrong in so far as he arrived at that conclusion on the authority of *Vanderspar & Co.* v. *Duncan & Co.*[9]

This only leaves the point whether the umpire was entitled to assess the damages as he did on the basis of the hire claimed by the shipowners for the twenty-six days by which it was agreed that the period of delay had been prolonged by the action of the Egyptian authorities in refusing repair facilities.

On behalf of the charterers it was argued that loss resulting to the shipowners from a refusal by the Egyptian authorities to allow repair facilities in the event of a breakdown was not loss or damage naturally flowing from the carriage of unlawful merchandise, nor was such loss reasonably foreseeable in all the circumstances, and that consequently the shipowners were only entitled to recover nominal damages.

[9] 8 T.L.R. 30.

If I am right in the view which I take that the umpire's findings of fact justify me in law in finding that the vessel was carrying unlawful merchandise, I find myself quite incapable of accepting the charterers' contentions on this point. In the first place, I think that the matter is substantially concluded by the umpire's findings. He was clearly entitled to find on the evidence that the shipowners had been involved in a substantial loss by the extra delay caused by the action of the Egyptian authorities. On all the facts found it seems to me that the umpire was well entitled to conclude that the charterers, having received letter No. 9443, must have decided to disregard the prohibition contained in it and thus to subject the vessel to any sanctions which Egyptian law might impose on vessels which broke the law. The most effective sanction which can be applied to a merchant ship is to detain or delay her and thus to involve her owners in loss and expense. The only question which the umpire has submitted for the opinion of this court is whether the claimants are entitled to recover this sum of £2,131 12s. 11d. or not. Even if I had felt that it could possibly be said that the umpire, in awarding the sum which he did, had acted on no evidence, or had misdirected himself in law, I am not sure that I should not have been precluded from interfering with the quantum of damages awarded by the form in which the umpire has stated this question for the decision of the court.

I was referred to *Royal Greek Government* v. *Minister of Transport*,[10] in which an award in the form of a special case came up for consideration by Devlin J. In that case the arbitrator had had to choose, from a number of possible competing causes, the direct or proximate cause of the damage. Devlin J. said [11]: "So the matter comes down to this, that the arbitrator has "selected one cause in preference to another as the proximate or "direct cause. I cannot see that any question of law is involved "in this selection. In this last analysis, Sir Robert says that "the decision is for the court applying the standard of the "reasonable man. I cannot accept that. All conclusions of fact "—that is, fact and inference from fact: see *Strathlorne Steamship Co. Ld.* v. *Andrew Weir & Co.*, *per* Lord Hanworth M.R.[12] "—are for the arbitrator. What is reasonable is always a question "of fact. The arbitrator is the person whom the parties have "chosen, as they are entitled to do, to apply finally the standard "of common sense; and common sense is, I believe, the only

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[10] 66 T.L.R. (Pt. 1) 504.

[11] Ibid. 513.

[12] (1934) 40 Com.Cas. 168, 172.

"test that can be applied to the choice between several causes, "all of which are sufficient in law. In my judgment an arbitrator's finding on causation, unless he can be shown to have "misdirected himself on some principle of law, or on some point "of construction or to have acted on insufficient evidence, is "conclusive."

With that passage I respectfully agree, and the passage was, moreover, approved by Sellers J. in *André et Cie, S.A.* v. *J. H. Vantol Ld.*[13] In that case Sellers J., however, entered a caveat with regard to the concluding words of the passage which I have read from Devlin J.'s judgment in connexion with the words "insufficient evidence."

Fortified by the view expressed by Devlin J. and approved by Sellers J. in the cases to which I have referred, I feel well satisfied that in this case it is impossible to say that the umpire has misdirected himself or has acted without any evidence in assessing the damages as he has done. I think, if I may be permitted to say so, that it was common sense for the umpire to assess the damages as he did. Without entering too deeply into the theory of causation where the parties submit to an arbitrator or an umpire the determination of the question whether certain damage is attributable to one cause or another, unless it can be shown, in the words which I have already quoted, that the determination was clearly wrong in law, his finding is unassailable. The parties having chosen their arbitrator or umpire must for better or worse abide by his determination.

The only real doubt which I have felt in the case is whether I ought not to send this award back to the umpire to make specific findings of fact on certain matters; for instance, with regard to the ownership of the cargo on board the vessel; with regard to the precise terms of Egyptian law which were applicable, and the effect of black-listing under Egyptian law.

Mr. Roskill, on behalf of the charterers, contended that the award was bad on its face and ought to be set aside, and he also criticized the findings of fact of the umpire, saying that they were imprecise and insufficient to justify the conclusion at which he had arrived. Mr. Roskill deliberately refrained from inviting me to remit the award to the umpire to find further facts. Concluding, as I do, not without some hesitation, that it is possible to spell out sufficient findings of fact in the award to enable me to determine the question submitted to the court,

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[13] [1952] 2 Ll.Rep. 282.

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Leolga Compania de Navigacion v. John Glynn & Son Ld.

I do not propose to send it back to the umpire, but to affirm the award which he has made, and I accordingly do so.

Award affirmed.
Judgment for the shipowners.

Solicitors: *Thomas Cooper & Co.; Holman, Fenwick & Willan.*

REGINA *v.* WEBB.

C. C. A.

1953 *Apr.* 27.

Lord Goddard C.J., Lynskey and Parker JJ.

Criminal Law — Sentence — Probation order — Breach — Conviction of other offences—Duty of court to pass separate sentence for breach of probation — Conditional discharge — Concurrent sentences — Criminal Justice Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 58), *ss.* 8, 12 (1).

Where a court, in sentencing a prisoner who had pleaded guilty to charges of housebreaking and larceny, was also asked to take into consideration a breach of a probation order, a separate sentence should have been passed in respect of the breach of probation so that the original offence might rank as a conviction by virtue of the proviso to section 12 (1) of the Criminal Justice Act, 1948.[1]

Since it is important that offenders should realize that breach of a probation order or conditional discharge will involve punishment for the original offence, concurrent sentences for the original and subsequent offences should be passed only in exceptional circumstances.

Appeal against sentence.

The appellant, Charles Victor Webb, pleaded guilty at Essex Quarter Sessions on January 30, 1953, to three charges of housebreaking and larceny. Twenty-eight other offences and also a breach of probation, the appellant having been placed on two years' probation by the same quarter sessions on October 24, 1951, were taken into consideration. A sentence of five years' imprisonment was passed on each of the three charges, the sentences to run concurrently. None of the sentences was a concurrent sentence on the breach of probation.

The appellant appeared in person.

Lord Goddard C.J., reading the judgment of the court, stated the facts and continued: What makes this case one of some

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[Reported by Miss Elaine Jones, Barrister-at-Law.]

importance—of which we hope notice will be taken—is that a breach of probation was taken into consideration. The court desires to call the attention of all the courts exercising criminal jurisdiction to a matter which arises under section 12 of the Criminal Justice Act, 1948.[1] By subsection (1) of that section it is provided that a conviction for which the offender is either placed on probation or granted a conditional discharge shall be deemed not to be a conviction for any purpose other than the purposes of the proceedings in which the order is made and of any subsequent proceedings which may be taken against him under the foregoing proceedings of the Act. The section contains a proviso that, whenever an offender who was not less than 17 years of age at the time of the conviction for which he was placed on probation or conditionally discharged is subsequently sentenced for that offence under that part of the Act, that is to say, under section 8,[1] the provisions of the subsection shall cease to apply to the conviction. One of the effects of these provisions is that a conviction resulting in an order of probation or conditional discharge cannot rank as a conviction for the purpose of imposing thereafter a sentence of corrective training unless by reason of a subsequent offence a sentence is imposed for the earlier one.

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[1] Criminal Justice Act, 1948, s. 12: "(1) Subject as hereinafter "provided, a conviction of an offence "for which an order is made under "this Part of this Act placing the "offender on probation or discharging "him absolutely or conditionally shall "be deemed not to be a conviction "for any purpose other than the purposes of the proceedings in which "the order is made and of any subsequent proceedings which may be "taken against the offender under "the foregoing provisions of this Act:

"Provided that where an offender, "being not less than seventeen years "of age at the time of his conviction "of an offence for which he is placed "on probation or conditionally discharged as aforesaid, is subsequently "sentenced under this Part of this Act "for that offence, the provisions of "this subsection shall cease to apply "to the conviction."

S. 8: "(5) Where it is proved to "the satisfaction of the court by "which a probation order or an order "for conditional discharge was made, "or, if the order (being a probation "order) was made by a court of "summary jurisdiction, to the satisfaction of that court or the supervising court, that the person in "whose case that order was made has "been convicted and dealt with in "respect of an offence committed "during the probation period, or "during the period of conditional discharge, as the case may be, the "court may deal with him, for the "offence for which the order was "made, in any manner in which the "court could deal with him if he "had just been convicted by or before "that court of that offence.

"(6) If a person in whose case a "probation order or an order for conditional discharge has been made by "a court of summary jurisdiction is "convicted before a court of assize or "quarter sessions of an offence committed during the probation period "or during the period of conditional "discharge, or is dealt with by a "court of assize or quarter sessions "for an offence so committed in "respect of which he was committed "for sentence to that court, the court "of assize or quarter sessions may "deal with him, for the offence for "which the order was made, in any "manner in which the court of summary jurisdiction could deal with "him if it had just convicted him of "that offence.

"(7) If a person in whose case a "probation order or an order for conditional discharge has been made "by a court of summary jurisdiction "is convicted by another court of "summary jurisdiction of any offence "committed during the probation "period, or during the period of conditional discharge, that court may, "with the consent of the court which "made the order or, in the case of a "probation order, with the consent "of that court or of the supervising "court, deal with him, for the offence "for which the order was made, in "any manner in which the court "could deal with him if it had just "convicted him of that offence."

It appears that when a person subject to one of these orders is found guilty of a subsequent offence the court sentences him for the latter offence and not infrequently states that it is taking into account the breach of the probation order or of the conditional discharge. That was done in the present case, the prisoner being on probation at the time he committed the three offences. It must, however, be borne in mind that the practice of taking other offences into account, however beneficial and advantageous to an offender, is based merely on convention and has no statutory foundation. It arose entirely from a desire to give prisoners a clean sheet when they came out of prison, and to obviate the necessity or chance of their being re-arrested and charged and again returned to prison. A sentence which the court states takes other offences into consideration is still in law only passed for the offence with which the court is actually dealing. Thus, if a conviction only carries a sentence of, say, 12 months' imprisonment, the court cannot pass a larger sentence by taking other offences into consideration: see *Rex* v. *Tremayne* [2] and *Rex* v. *Hobson.*[3] It has also been held that when the conviction has been quashed on appeal the prisoner may be subsequently indicted and tried for offences which the court took into consideration. There had been no conviction for those offences so no plea of autrefois convict could be raised: *Rex* v. *Nicholson* (*No.* 2)[4]; *Rex* v. *Neal.*[5]

Merely to take breaches of probation or of conditional discharge into consideration is therefore undesirable and, indeed, wrong. They should be separately considered and separate sentences should be passed, so that the original offences may rank as convictions, as they will by virtue of the proviso already referred to.

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[2] (1932) 23 Cr.App.R. 191.

[3] (1942) 29 Cr.App.R. 30.

[4] (1947) 32 Cr.App.R. 127; [1947] 2 All E.R. 535.

[5] [1949] 2 K.B. 590; [1949] 2 All E.R. 438; (1949) 33 Cr.App.R. 189.

There may be cases in which a court would think fit to make the sentences for the original and subsequent offences concurrent, but it would seem desirable that this power should only be used exceptionally; it is most important that offenders should be made to realize that discharge whether on probation or conditionally is not a mere formality, and that a subsequent offence committed during the operative period of the order will involve punishment for the crime for which they were originally given the benefit of this lenient treatment. As the appellant has received a substantial sentence of five years, the court will impose a sentence for the breach of probation so that it may in future rank as a conviction. The sentence on the first count will be one of three years and on the other two counts the sentences will each be five years; for the breach of probation the sentence will be two years. All the sentences will run concurrently, but the sentence of five years in all will stand.

Appeal dismissed.

SHELDON *v.* BROWN BAYLEY'S STEEL WORKS LD. AND DAWNAYS LD.

C. A.
1953
July 10, 22.
Singleton and Denning L.JJ.

[1951 S. No. 4145.]

Practice — Writ — Service — Failure to serve within twelve months — Whether writ a nullity—Effect of unconditional appearance— R.S.C., Ord. 8, *r.* 1; *Ord.* 70, *r.* 1.

Although by the terms of R.S.C., Ord. 8, r. 1, a writ of summons does not remain in force for more than 12 months from the date thereof, it is not thereafter a nullity, but remains a writ, and where a defendant enters an unconditional appearance to a writ which has been served on him out of time, such appearance is a step in the action and amounts to a waiver by the defendant of the irregularity in the service of the writ which prevents him from setting up that such service was bad in law.

Dictum of Goddard L.J. in *Battersby* v. *Anglo-American Oil Co. Ld.* [1945] K.B. 23; 61 T.L.R. 13; [1944] 2 All E.R. 387 not followed.

In re Kerly, Son & Verden [1901] 1 Ch. 467; 17 T.L.R. 123, 189 considered.

Decision of Barry J. [1953] 1 W.L.R. 875; [1953] 2 All E.R. 382 reversed.

INTERLOCUTORY APPEAL from Barry J., sitting in chambers.

On October 12, 1950, the plaintiff's husband, Leslie Sheldon, met with a fatal accident in the course of his employment by the second defendants, Dawnays Ld. On October 3, 1951, the plaintiff, as widow and administratrix of the deceased man, issued a writ against Brown Bayley's Steel Works Ld., and Dawnays Ld., to recover damages under the Fatal Accidents Acts and the Law Reform (Miscellaneous Provisions) Act, 1934. In neither case was the writ served on the party concerned within 12 months of the date appearing on it as required by R.S.C., Ord. 8, r. 1.[1] The first defendants entered a conditional appearance to the writ, and on their application the service of the writ on them was set aside. On October 13, 1952, the second defendants entered an unconditional appearance, but on November 25, 1952, after hearing the result of the application to set aside the writ made by the first defendants, they took out a summons and applied to Master Clayton for an order that the service of the writ on them should be set aside, notwithstanding that appearance had been entered, on the ground that the writ had been served after the expiration of 12 months from the date of issue. Master Clayton made an order setting aside the writ.

The plaintiff appealed to the judge in chambers, and Barry J. affirmed the order of the master, holding that the service of a writ after the expiration of 12 months was not a mere irregularity, which was cured by the entry of an unconditional appearance, but that such service rendered the writ a nullity and wholly ineffective for all purposes, and, being so, the court or a judge had no power to permit it to be served since it was no longer in force. He accordingly dismissed the plaintiff's appeal.

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[1] R.S.C., Ord. 8, r. 1: "No original "writ of summons shall be in force "for more than twelve months from "the day of the date thereof, including the day of such date; but if "any defendant therein named shall "not have been served therewith, the "plaintiff may, before the expiration "of the twelve months, apply to the "court or a judge for leave to renew "the writ; and the court or judge, if "satisfied that reasonable efforts have "been made to serve such defendant, "or for other good reasons, may "order that the original or concurrent writ of summons be "renewed for six months from the "date of such renewal inclusive, and "so from time to time during the "currency of the renewed writ . . . "and a writ of summons so renewed "shall remain in force and be available to prevent the operation of any "statute whereby the time for the "commencement of the action may be "limited, and for all other purposes, "from the date of the issuing of the "original writ of summons."

Ord. 70, r. 1: "Non-compliance "with any of these Rules, or with "any rule of practice for the time "being in force, shall not render any "proceedings void unless the court "or a judge shall so direct, but such "proceedings may be set aside either "wholly or in part as irregular, or "amended, or otherwise dealt with in "such manner and upon such terms as "the court or judge shall think fit."

The plaintiff appealed to the Court of Appeal.

H. V. Lloyd-Jones Q.C. and *D. P. Croom-Johnson* for the plaintiff. Barry J. was wrong in holding that service of the writ after 12 months rendered the writ a nullity for all purposes so that after that time it was not capable of being revived under Ord. 64, r. 7, in the discretion of a judge. The failure to serve the writ within the prescribed time was an irregularity which was waived by the entry of an unconditional appearance by the second defendants. A writ is a nullity only if it is one which could never have been properly issued in law because the law and the rules do not permit of the bringing of an action such as that contemplated, e.g., where there are a number of plaintiffs with different causes of action joined in one writ: *Smurthwaite* v. *Hannay*.[2] Both the master and the judge held that the writ was a nullity and that there was no question of there being an irregularity which could be waived, with the result that, despite the unconditional appearance entered by the second defendants, they were entitled to have the writ set aside. It is clear from Ord. 64, r. 7, that a judge has power to allow a writ to be served after the expiration of 12 months, and Ord. 70, r. 2, provides that no application to set aside any proceeding for irregularity shall be allowed unless made within a reasonable time, nor if the party applying has taken any fresh step after knowledge of the irregularity.

Barry J. founded his opinion that the writ in the circumstances of the present case was a nullity on the dictum of Goddard L.J. in *Battersby* v. *Anglo-American Oil Co. Ld.*,[3] but it is submitted that the observations therein on the question of the writ being a nullity were obiter and should not be followed since the court was there concerned only with the question of the discretion of the judge to renew a writ after the expiration of 12 months from the date of service when to do so would be to deprive the defendant of an accrued defence of limitation. It was conceded by the defendants in the present case that if the service of the writ was an irregularity, and did not render the writ itself a nullity, they had waived the irregularity by entering an unconditional appearance (see *Lloyd and Wife* v. *Great Western Dairies Co. Ld.*[4]), and *Fry* v. *Moore*[5] shows how far the court has gone in allowing

[2] [1894] A.C. 494; 10 T.L.R. 649.

[3] [1945] K.B. 23; 61 T.L.R. 13; [1944] 2 All E.R. 387.

[4] [1907] 2 K.B. 727; 23 T.L.R. 570.

[5] (1889) 23 Q.B.D. 395.

the waiver of an irregularity. In the present case the failure to serve the writ was an irregularity which was waived by the defendants taking a further step in the proceedings, namely, entering an unconditional appearance after knowledge that the irregularity existed. [Reference was also made to *Holman* v. *George Elliot & Co. Ld.*[6]; *In re Orr Ewing, Orr Ewing* v. *Orr Ewing*,[7] and *In re Kerly, Son & Verden.*[8]]

Neil Lawson for the defendants. Barry J. was right, on the reasoning of Goddard L.J. in *Battersby* v. *Anglo-American Oil Co. Ld.*,[9] in holding that the writ, at the time of its purported service on the second defendants, was a nullity. The service of the writ being a nullity, and not a mere irregularity, cannot be waived because it was something which was not effective ab initio: *Smurthwaite* v. *Hannay.*[10] It is submitted that either (a) the court should have regard to the unbroken line of authority which establishes that a renewal of a writ will not be allowed after a period of 12 months has elapsed from the date of its issue without service being effected, which supports the view that such a writ, though initially valid, has become null and void (see the authorities referred to by Goddard L.J. in *Battersby's* case [11]), or (b), that, in so far as *In re Jones, Eyre and Cox* [12] and passages in the argument of counsel in *Battersby's* case [13] suggest that an application for renewal may be made after 12 months from the issue of the writ under the provisions of Ord. 64, r. 1, this is wrong having regard to the imperative terms of Ord. 8, r. 1.

It is clear from the authorities referred to in *Battersby's* case [13] and from that case itself that the court would not have granted an application for the renewal of the writ in the present case after 12 months from the date of issue because the effect would be to deprive the defendants of their statutory defence of limitation under section 3 of the Fatal Accidents Act, 1846. One day after the expiration of 12 months from the date of the issue of the writ the defendants were in a protected position by virtue of section 3, and they cannot be deprived of that protection as the result of an unintentional error on the part of their solicitors in entering an unconditional appearance. The procedure under Ord. 12, r. 30, in relation to the making of applications to set aside proceedings before appearance or after conditional appearance, is not mandatory and does not mean that an unconditional appearance deprives a defendant of his right to apply to the court, under its inherent jurisdiction, to strike out proceedings which constitute an abuse of the process of the court, as would be the case when a writ had purported to have been served when it was no longer in force.

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[6] [1944] K.B. 591; 60 T.L.R. 394; [1944] 1 All E.R. 630.

[7] (1882) 22 Ch.D. 456.

[8] [1901] 1 Ch. 467; 17 T.L.R. 123.

[9] [1945] K.B. 23; 61 T.L.R. 13; [1944] 2 All E.R. 387.

[10] [1894] A.C. 494; 10 T.L.R. 649.

[11] [1945] K.B. 23.

[12] (1877) 25 W.R. 303.

[13] [1945] K.B. 23.

Finally, the reference to *In re Kerly, Son & Verden* [14] in the notes to Ord. 8, r. 1, in the Annual Practice, 1953, at p. 479, is misleading. It is there said that the rule means that the writ shall be in force for the purpose of service for 12 months, not that it ceases to be efficacious for any purpose. The statement is based on the authority of *In re Kerly, Son & Verden* [14] and is misleading because in that case an appearance had in fact been entered within 12 months to a writ served less than 12 months before. The authority, therefore, cannot apply to a case where a writ has not been served within 12 months of its date of issue.

H. V. Lloyd-Jones Q.C. replied.

Cur. adv. vult.

July 22. The following judgments were read:—

SINGLETON L.J. The writ in the action was issued on October 3, 1951, just within the 12 months limit prescribed by section 3 of the Fatal Accidents Act, 1846. There were two defendants, neither of whom was served with the writ within 12 months from the day of its date. We are only concerned with the second defendants, Dawnays Ld.

The first defendants made a conditional appearance and successfully applied to have service upon them set aside. Dawnays Ld. entered an unconditional appearance. The affidavit of the secretary of the company shows that they heard of the first defendants' successful application, and thereafter made an application of the like kind. The summons is dated November 25, 1952. The master granted the application and set aside the service of the writ.

On appeal, Barry J. upheld the order of the master. He said that it was a difficult case, and he granted leave to appeal to this court. On the facts as to service I am in complete agreement with the master and the judge; indeed, there was no appeal as to this.

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[14] [1901] 1 Ch. 467; 17 T.L.R. 123.

Under Ord. 8, r. 1, the writ of summons ceases to be in force after 12 months from the day of the date thereof. A note in the Annual Practice, 1953, at p. 59, says: "This means shall be in "force for the purpose of service for 12 months, not that the "writ ceases to be efficacious for any purpose whatever. And "after an undertaking by solicitors to accept service and appear "(see Ord. 9, r. 1), it would require a very strong case to induce "the court to refuse renewal"; and support for that statement is to be found in *In re Kerly, Son & Verden* [1] [see the judgment of Farwell J. in the court of first instance, and that of Stirling L.J. in the Court of Appeal [2]].

Order 64, r. 7, provides: "A court or a judge shall have "power to enlarge or abridge the time appointed by these rules, "or fixed by an order enlarging time, for doing any act or taking "any proceeding, upon such terms (if any) as the justice of the "case may require, and any such enlargement may be ordered "although the application for the same is not made until after "the expiration of the time appointed or allowed. Provided that "when the time for delivering any pleading or document or filing "any affidavit, answer or document, or doing any act is or has "been fixed or limited by any of these rules or by any direction "on or under the summons for directions or by any order of the "court or a judge the costs of any application to extend such "time and of any order made thereon shall be borne by the party "making such application unless the court or a judge shall "otherwise order."

It has been held over a long period of years that this rule enables the court to renew a writ even though application is not made until after the expiration of 12 months laid down under Ord. 8, r. 1. The court will not normally exercise its discretion in favour of the renewal of a writ after the period of service has expired if the effect of doing so will be to deprive a defendant of the benefit of a limitation which has accrued. In the present case, if the order of Barry J. is right, Dawnays Ld. are free, for it is too late for the issue of another writ, having regard to the terms of section 3 of the Fatal Accidents Act, 1846.

The position was considered by the Court of Appeal in *Battersby* v. *Anglo-American Oil Co. Ld.*,[3] a case in which the court would not exercise its discretion in favour of the renewal of a writ after the period allowed for service had expired, nor would the court allow an amendment of the pleadings to be made, as the effect of doing so would be to deprive a defendant of the benefit of a limitation which had accrued. In that case counsel for the defendants who appealed, Mr. Valentine Holmes, argued[4]: "Where an original writ of "summons has been in force for more than 12 months without "being renewed it is no longer in force and is a nullity: R.S.C., "Ord. 8, r. 1; but by virtue of what is now Ord. 64, r. 7, there "is normally power to renew it after the expiration of that period "of 12 months: *In re Jones, Eyre and Cox.*[5] The court, how"ever, will never exercise this discretion when its exercise will "defeat the vested rights of a defendant to plead a statute of "limitations."

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[1] [1901] 1 Ch. 467; 17 T.L.R. 123, 189.

[2] [1901] 1 Ch. 467, 471, 478.

[3] [1945] K.B. 23; 61 T.L.R. 13; [1944] 2 All E.R. 387.

The court accepted that submission. The judgment of the Court of Appeal was delivered by Goddard L.J., who said[6]: "Before dealing with the authorities on this point we think we "ought to refer to one matter dealt with in the judgment of "MacKinnon L.J. in *Holman's* case,[7] which was not strictly "necessary for the decision, but from which we feel constrained "to differ. That, also, was a case under the Fatal Accidents "Act, 1846, and, as in the present action, a writ was issued "within 12 months of the death, but was not served, and applica"tion for renewal was not made within 12 months of the date of "issue. Acceding to an argument advanced by the plaintiff, "MacKinnon L.J. is reported as saying[8]: 'Mr. Fox-Andrews "'for the plaintiff points out, and I think with reason, that this is "'not a case where the order of the learned judge, in extending "'the period for the service of the writ, deprives the defendants of "'an accrued right of defence under Lord Campbell's Act. The "'right of defence by the limitations section of Lord Campbell's "'Act would arise if the writ had not been issued before "'October 9, 1942. It was, in fact, issued on October 7, 1942, "'two days before the expiry of the 12 months from the date of "'the accident.' With all respect, we are unable to agree that "the issue of a writ which has become a nullity by reason of "non-service within the prescribed time satisfies the section. If "the writ has ceased to be in force the position is the same as "if it had never been issued. Otherwise we see no reason for "the concluding words of rule 1 of the order which provides for

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[4] [1945] K.B. 23, 24.
[5] 25 W.R. 303.
[6] [1945] K.B. 23, 28–9.
[7] [1944] K.B. 591; 60 T.L.R. 394; [1944] 1 All E.R. 639.
[8] [1944] K.B. 591, 593.

"a renewed writ preventing the operation of statutes of limitations. These words would be unnecessary if a writ which had "expired and had not been renewed would answer that purpose. "A new writ, issued more than 12 months after the date, would "clearly be out of time, so either the writ originally issued must "be renewed or the action is barred."

I do not regard it as strictly accurate to describe a writ which has not been served within 12 months as a nullity. It is not as though it had never been issued. It is something which can be renewed. You cannot renew a nullity. The court can grant an application which results in making it just as effective as it was before the 12 months period had elapsed. I do not think that the court had in mind that which had been said in *Kerly's* case [9] to which I have referred. Moreover, it was not necessary for the decision of the court in *Battersby's* case [10] to consider this. The question was whether the court would exercise the discretion which it had under Ord. 64, r. 7, to renew a writ when the renewal would deprive a defendant of the benefit of a limitation which had accrued, and the judgment was to the effect that discretion ought not to be exercised in such circumstances. If the writ had been a nullity there would have been no point in considering whether the court should exercise its discretion to renew it. The position under Ord. 8, r. 1, is that the writ is not in force for the purpose of service after the 12 months period has run; it is still a writ. The unconditional appearance by Dawnays Ld. is a step in the action; it amounts to a waiver with regard to service; it prevents Dawnays Ld. from being able to contend successfully that the service on them is bad.

It does not appear that the attention of Barry J. was drawn to Ord. 12, r. 30, which is in these terms: "A defendant before "appearing shall be at liberty, without obtaining an order to "enter or entering a conditional appearance, to take out a "summons in the Queen's Bench Division and in any other "Division take out a summons or serve notice of motion to set "aside the service upon him of the writ or of notice of the writ, "or to discharge the order authorizing such service." That rule provides the procedure for setting aside service of the writ. (See the note in the Annual Practice under the Order "Before "appearing.") The rule gives support for the view which I have stated above.

Mr. Neil Lawson submitted that there was still an inherent jurisdiction in the court to set aside service of the writ. I do not see why we should be asked to act upon any such assumption when there is a practice rule which is clear in its terms, and which appears to recognize the entering of an unconditional appearance as a step in the action.

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[9] [1901] 1 Ch. 467.

[10] [1945] K.B. 23.

In my opinion the appeal should be allowed.

DENNING L.J. It is enacted that every action for damages under the Fatal Accidents Act, 1846, "shall be commenced "within 12 calendar months after the death" of the deceased person. This action was commenced within that time. The death was on October 12, 1950. The writ was issued on October 3, 1951. That writ should have been served within the next 12 months, because under the Rules of Court (Ord. 8, r. 1) a writ does not remain in force for more than 12 months unless the court gives leave to renew it; and the court does not, as a rule, give leave to renew a writ if the effect of so doing would be to deprive the defendant of the benefit of a statute of limitation: see *Battersby* v. *Anglo-American Oil Co. Ld.*[11]

This writ was not served within the 12 months permitted by the rule. It was served three or four days out of time. The first defendants thereupon entered a conditional appearance and got the service on them set aside. That meant that they obtained the benefit of the statutory limitation; because all that the plaintiff could then do, as against them, was to issue a new writ which would be statute barred. The second defendants, however, did not notice that the writ was served out of time. On October 13, 1952, they entered an unconditional appearance, but they soon afterwards came to know what the first defendants had done, and then they also applied to have the service of the writ set aside. The question is whether they are prevented from so doing by reason of their unconditional appearance. This depends on whether the service of a writ, after the 12 months permitted by the rule has expired, is a nullity or an irregularity. If it was an irregularity, then the irregularity was waived by the unconditional appearance; but if it was a nullity, then it could not be waived at all. It was not only bad, but incurably bad.

In determining the question it is important to notice that, even after 12 months have expired, the writ can be renewed. This is not done under Ord. 8, r. 1, for that only permits renewal before the 12 months have expired. It is done under Ord. 64, r. 7, which is the general rule permitting enlargement of time. It was first done in 1877 by Sir George Jessel M.R. in *In re*

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[11] [1945] K.B. 23.

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Jones,[12] which has been accepted as good law ever since. Now, if a writ can be renewed after the 12 months have expired, that must mean that it is not then a nullity.

There are other reasons, too, why the writ cannot be considered a nullity. Suppose a defendant, who is served after the 12 months, deliberately enters an unconditional appearance and goes to trial. It may be that it is a case where no statute of limitation avails him and he does not think it worth while to object to the service of the writ, because he knows that it would only mean the issue of a fresh one. Could he thereafter turn round and say that all the proceedings were void on the ground that the writ was a nullity? Clearly not. That shows that the service out of time was only an irregularity which could be waived.

The judge likened this case to one where a mere form of writ (which had never been issued out of the central office) was served. Such a form would, I agree, be a nullity. No waiver could give effect to it or to any subsequent proceedings founded on it. I cannot regard that as anything like this case. If we accept the plaintiff's evidence, the writ was served by post on October 1, 1952, and should have reached the second defendants on October 2, 1952, before the 12 months had expired. It was delayed in the post and did not in fact reach them until October 7, 1952, after the 12 months had expired. The delay was a matter known to them and not to the plaintiff. If they chose to waive any objection to it they should be held bound by their waiver. They should not be allowed to turn round and say that the writ itself was a nullity. If they could say so now, they could also say so at a much later stage, even after the trial. I cannot believe that to be the law.

It follows that I think that the dictum in *Battersby's* case [13] is incorrect. When the rule says that, after 12 months, the writ is no longer in force, it only means that it is no longer in force for the purpose of service: see *In re Kerly, Son & Verden.*[14]

In my opinion, the service of the writ after the 12 months was not a nullity but an irregularity which was waived by the unconditional appearance. I agree that the appeal should be allowed.

Appeal allowed.

Solicitors: *W. H. Thompson; Kenneth Brown, Baker, Baker for Gee & Edwards, Swansea.*

P. B. D.

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[12] 25 W.R. 303.

[13] [1945] K.B. 23, 29.

[14] [1901] 1 Ch. 471, 479.

REGINA *v.* WELSHPOOL JUSTICES. *Ex parte* HOLLEY.

1953
July 28, 30.

Lord Goddard C.J., Parker and Donovan JJ.

Justices—Practice—Legal points raised at hearing of information—Justices' retirement with clerk—Clerk remained with justices while facts discussed—Shorthand writer's presence required to read note of part of the evidence to justices—Sentence—Regularity.

At the hearing of an information at which several legal points were raised, the justices required their clerk to retire with them to advise them. They subsequently asked the shorthand writer to come to their room and bring her notebook. The justices found the offence proved. The defendant moved for an order of certiorari to bring up and quash his conviction on the grounds that the clerk remained in the justices' room during substantially the whole of their retirement and was therefore present when facts were being considered, and that the shorthand writer went into their room though the defendant was not informed for what purpose nor of the purport of the information which she gave them:—

Held, (1) that the justices were entitled to require their clerk to accompany them to their room to advise them on the law; and his subsequent presence in the room while they were discussing facts was not sufficient objection to invalidate their decision.

Reg. v. *East Kerrier Justices, Ex p. Mundy* [1952] 2 Q.B. 719; [1952] 1 T.L.R. 1618; [1952] 2 All E.R. 144 explained.

(2) That as the shorthand writer was taking a note of the evidence to which the justices were entitled to refer there was nothing improper in sending for her; should such circumstances arise in the future it would be better if justices came into open court and requested the shorthand writer to read the note required.

MOTION for certiorari.

The applicant, Edward John Holley, the licensee of the White Lion Hotel, Welshpool, was charged with selling intoxicating liquor outside permitted hours, contrary to section 4 of the Licensing Act, 1921. At the hearing of the information the deputy clerk to the justices and a Miss Owen, in the employment of the Magistrates' Court Committee, who took a shorthand note of the evidence, were present in court. Several legal points having been raised during the course of the hearing, the justices requested the deputy clerk to retire with them to advise them, which he did. After an interval the clerk came back into court and asked Miss Owen to come to the justices' room and bring her notebook.

The justices, in their affidavits, stated that after having disposed of the legal points they considered the evidence. They had

[Reported by Miss C. J. ELLIS, Barrister-at-Law.]

formed certain impressions of the police evidence, but before coming to a decision wished to have their impression confirmed by Miss Owen's shorthand note. The deputy clerk then went to fetch Miss Owen, who read a small portion of her note to the justices which confirmed their impression of the evidence. The justices' affidavits made it clear that the clerk remained in the justices' room while they were considering the facts and after he had given his advice on such matters of law as they required. Nothing was said in open court as to the point in the police evidence which required elucidation or what note was read to the justices.

The justices found the offence proved and fined the applicant £5. He moved for an order of certiorari on the ground that the procedure adopted by the justices in having the deputy clerk and shorthand writer into their private room was irregular.

P. L. W. Owen for the applicant. On the authority of *Reg.* v. *East Kerrier Justices, Ex parte Mundy*,[1] the conviction should be quashed. Although the justices' clerk retired with the justices initially to consider questions of law, he in fact remained with them throughout the whole of their retirement and during their consideration of the facts. If it is wrong for a clerk to retire with the justices when matters of fact are to be discussed, it is even more irregular for a shorthand writer to retire with the justices.

[Lord Goddard C.J. Is it suggested that the justices should have come back into court and asked the shorthand writer to read the passage in the evidence?]

Yes, and that submission is based on the fact that not only must justice be done, but justice must be seen to be done: *Rex* v. *Justices of Bodmin, Ex parte McEwen.*[2]

[Lord Goddard C.J. In the *East Kerrier* case [3] the court only meant that it was not good practice for the clerk to retire with the justices as a matter of course.]

Having disposed of the questions of law, the clerk should have come out of the room. The position of justices when deciding questions of fact is analogous to that of a jury in the jury room: *Rex* v. *Reason.*[4] A jury would have no right to require the presence of the shorthand writer in the jury room, and a fortiori the justices had no right to require the shorthand writer to go to their room when they were considering questions of fact.

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[1] [1952] 2 Q.B. 719; [1952] 1 T.L.R. 1618; [1952] 2 All E.R. 144.

[2] [1947] K.B. 321; [1947] 1 All E.R. 109.

[3] [1952] 2 Q.B. 719.

[4] (1795) 6 Term Rep. 375.

John Perrett for the justices. Had the clerk to the justices himself taken the notes of the evidence the justices would have been entitled to ask him to read part of his notes. In the present case the clerk employed someone to take the notes. Everything was open and above board. In the *East Kerrier* case [5] the nature of the document was concealed. In the *Bodmin* case [6] a witness was interviewed by the justices in their private room.

[LORD GODDARD C.J. What the justices did here was not regular, but it is difficult to say whether they were acting so irregularly as to merit a certiorari issuing to them.]

In the *East Kerrier* case,[7] *Davies* v. *Griffiths* [8] was distinguished on the ground that the subsequent statement in open court put right the error in form made during the proceedings. There is no necessity in this case to put anything right, because the justices merely heard a note of evidence read which confirmed their own opinion.

[LORD GODDARD C.J. Yes, but how did the appellant know that the note was right?]

The irregularity, if there be one, is not of a serious nature, and an order of certiorari should not issue.

Owen in reply. The irregularity is a serious one, and an order of certiorari should issue.

Cur. adv. vult.

July 30. LORD GODDARD C.J., reading the judgment of the court, stated the facts and continued: I do not think that anyone can misunderstand what the court meant by their judgment in *Reg.* v. *East Kerrier Justices, Ex parte Mundy.*[1] It was that the clerk's presence in the room when the justices were deliberating should be only for the purpose of advising them on the law. In saying that if they required his advice they should send for him we did not mean, nor do I think there could be any misunderstanding on the matter, that if a point of law had been raised during the hearing the justices could not ask their clerk to come into the room with them as they retired so that they could at once consult him and then could consider the evidence in the light of his advice. Here the clerk went out with the justices and no doubt stayed out with them while they were considering the facts, and was present when some question arose on the evidence for which they thought it necessary to send for the shorthand writer. The latter fact shows that the justices needed to refresh their memories as to the evidence on some point on which one may assume there was discussion, and all this time the clerk remained in the room and still remained after his amanuensis was sent for. But it is clear that the justices did nothing wrong in taking the clerk with them to their room as they required his advice on law and in these circumstances we are not prepared to say that merely because he remained in the room while they were discussing the facts that in itself was a sufficient objection to invalidate their decision. It is often difficult to disentangle what is purely a question of law from a question of fact and a discussion on law must have regard to the particular facts of the case to which it is desired to apply the law. We think it would be putting too high a burden on justices who had required, and legitimately required, the presence of their clerk for the purpose of taking his advice to say at a particular moment: "Now you must leave the room while we deliberate "further." At any rate we are not prepared to say that what happened in this case so far as the clerk's presence was concerned should invalidate the conviction.

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[5] [1952] 2 Q.B. 719.

[6] [1947] K.B. 321.

[7] [1952] 2 Q.B. 719.

[8] (1937) 53 T.L.R. 680; [1937] 2 All E.R. 671.

[1] [1952] 2 Q.B. 719; [1952] 1 T.L.R. 1618; [1952] 2 All E.R. 144.

With regard to the presence of the shorthand writer, she was taking a note of the evidence to which the justices were entitled to refer. Had the clerk himself taken the note, even if he remained in court while the justices had retired, we cannot conceive that there would be any objection to the justices sending for his note to refresh their memory. Nor do we think that in these circumstances we can say that sending for the shorthand writer was improper. No one could have supposed that she had gone into the room for any purpose other than to read to the magistrates the evidence or some of the evidence which she had taken down. At the same time it would be better should this state of affairs arise again if the magistrates came into open court and asked the shorthand writer to read his or her note on any particular point which they might require. Shorthand writers do occasionally make mistakes, though it is remarkable how few errors are made, at any rate by shorthand writers who are experienced in taking a note of evidence in courts. It would, we think, be better, as we have said, that this should be done in court where, if any question were to arise with regard to the accuracy of the shorthand note, it could be corrected. Justices will, I feel sure, recognize that it is their duty to obey a direction of this court not only in the letter, but in the spirit, and that they are not to get round the direction which was given in the *East Kerrier* case [2] merely by pretending that they require the presence of their clerk to advise them when there is nothing but fact to be considered. In this case, as we have said, we think the justices were entitled to have their clerk in the room with them and as we do not think there could be any reasonable misunderstanding as to the reason why they sent for the shorthand writer, the court will not in its discretion order a certiorari to issue and this motion accordingly fails.

Application refused.

Solicitors: *Jaques & Co., for Emrys Jones & Co., Welshpool; Robbins, Olivey & Lake, for Gilbert Davies & Roberts, Welshpool.*

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[2] [1952] 2 Q.B. 719.

BUTLER *v.* HUDSON.

[Plaint No. F. 1682.]

C. A.

1953
June 8, 9.

Evershed M.R., Birkett and Romer L.JJ.

Landlord and Tenant—Rent restriction—County court—Practice—Transmitted statutory tenancy—Application for declaration by sole claimant—Jurisdiction—Remission to registrar for decision—Application to vary registrar's decision—Status and duty of judge—"Vary"—"Rescind"—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *ss.* 12 (1) (*g*), 17 (2); *County Courts Act,* 1934 (24 *&* 25 *Geo.* 5, *c.* 53), *s.* 90—*Increase of Rent and Mortgage Interest (Restrictions) Rules,* 1920, (*S.R. & O.* 1920, *No.* 1261/*L.*37), *rr.* 1, 7, 19.

A house was let in 1908 either to a husband or to his wife. After the contractual tenancy had determined, the husband and wife continued in possession, one or the other of them being the statutory tenant, since the house was within the Rent Acts. In 1936, the husband died and his wife remained in possession. On her death, in 1950, her daughter, who had lived with her parents in the house for many years, applied to the county court for a declaration in purported pursuance of section 12 (1) (*g*) [1] of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, that she was entitled to succeed to the statutory tenancy of her mother. The matter was remitted to the registrar for a decision, and he declared that she was the statutory tenant. The landlord applied to the county court judge to vary the registrar's order; the judge, after referring to an expert on handwriting for his opinion as to a point of evidence —whether the first rent book was inscribed "Mr." or "Mrs." (the husband or the wife)—rescinded the order. The daughter appealed:—

Held, that the application was misconceived, for it was not, as it purported to be, an application under the latter part of section 12 (1) (*g*) of the Act of 1920. Section 12 (1) (*g*) was a definition section, and though the court had jurisdiction, on application, to resolve a dispute between rival claimants to be the "tenant," as therein defined, this application by a sole claimant for a declaration that she was "entitled to succeed to the statutory tenancy" was not within the section. Consequently, as rule 19 of the Increase of Rent and Mortgage Interest (Restrictions) Rules, 1920, under which the matter was remitted to the registrar for decision, related only to applications under section 12 (1) (*g*) of the Act of 1920, the remission was made without jurisdiction, and all the proceedings which followed were a nullity.

Held, secondly, where a matter had been validly referred to a registrar under rule 19, the judge had power on application to vary the registrar's order, but he could not rescind it. In hearing an application under rule 19 to vary an order made by the registrar pursuant to rule 7, the judge was still sitting as a judge of first instance and not in an appellate capacity, and though he need not hear all the evidence which had been recorded by the registrar, he ought to hear any fresh evidence relevant to the issue which the parties might desire to put before him; and, prima facie, he should not interfere with a finding of fact by the registrar without rehearing the witnesses as to that fact.

British and Argentine Meat Co. Ld. v. *Randall* [1939] 4 All E.R. 293 and *Gregson* v. *Prior* (1925) 42 T.L.R. 7 considered.

Held, thirdly, that, under section 90 of the County Courts Act, 1934, it was not competent to refer a matter for the opinion of an expert. Section 90 empowered a reference for inquiry and report only.

Quaere whether under section 17 (2) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, the court had jurisdiction to make a declaratory judgment in a claim or proceeding arising out of the Rent Acts.

Decision of Judge Hodgson reversed.

APPEAL from Judge Hodgson, sitting at Wandsworth County Court.

In 1908, one Earland built a house known as 117 Gatton Road, Tooting, and when it was completed he granted a tenancy to either a Mr. Butler or to his wife, Mrs. Butler. They occupied the house with their two daughters, one of whom subsequently married the son of Earland. No rent book was issued to the tenant, nor, apparently, was the contract of tenancy evidenced in writing until in 1923, the reversion having, by that time, been acquired by a Mr. Hudson from Earland, a rent book was issued. Mr. Hudson wrote the name of the tenant on that book but, unfortunately, his handwriting was not clear and it was obscure whether he had written "Mr." or "Mrs." Butler. Mr. Butler died in 1936, the contractual tenancy having before that date been determined by virtue of increases of rent. After the death of Mr. Butler his wife continued to live at 117 Gatton Road, with her unmarried daughter, Dorothy, her sister having gone away after her marriage. On August 22, 1950, Mrs. Butler died. Miss Butler wished to remain on in the premises, but the landlord, now Miss Hudson, wrote: "Mr. Henry Butler was the "first tenant of 117 Gatton Road, in 1908. His name is on the "records at Wandsworth Borough Council. The tenancy was "passed to Mrs. Butler in 1936. The house is now freed and "if Miss Butler wishes to purchase the price will be dealt "with. . . ."

Miss Butler then made an originating application to the county court entitled "In the matter of the Increase of Rent and "Mortgage Interest (Restrictions) Acts, . . . and in the matter "of No. 117 Gatton Road, Tooting." By the application, to which Miss Hudson was respondent, Miss Butler asked for a declaration that on the death of her mother, on August 22, 1950, she succeeded to the statutory tenancy of 117 Gatton Road, Tooting, and she asked for costs. By a statement in support of her application she stated that "there "has been no previous transmission of the statutory tenancy "of 117 Gatton Road, and the applicant claims to be "entitled to succeed to the said statutory tenancy pursuant to "the provisions of section 12 (1) (*g*) of the Rent Act of 1920." [1] By the defence which was then set up, it was said: "the "respondent denies that there has been no previous transmission "of the statutory tenancy."

The subsequent history of the litigation was, in outline, as follows. The application was remitted to the registrar, who, after hearing evidence, made a declaration that the applicant was "the statutory tenant" of the premises in question. The landlord, Miss Hudson, applied to the judge to vary or to rescind that decision. At the hearing of her application, made in the form of an "appeal," Judge Hodgson ruled that he would not require to hear further evidence than that which had been before the registrar, but, subsequently, with the consent of the parties, the opinion of a handwriting expert was taken on the question whether, in 1923, Mr. Hudson had written "Mrs." Butler (as the registrar had found) or "Mr." Butler on the rent book then issued to the tenant. The registrar had attached great weight to that evidence, though the writing on the rent book was made some 15 years after the grant of the tenancy. The expert on handwriting to whom the matter was referred, a Mr. Gurrin, reported in favour of the contention that the name written was "Mr." Butler, a view which supported the landlord's contention. Miss Butler and her advisers did not avail themselves of an invitation by the respondent to call the expert before the court so as to give Miss Butler's advisers an opportunity of cross-examining him. Subsequently, she made an application to call fresh evidence, but Judge Hodgson refused it; the witness which she then desired to call being her married sister who had, apparently, been living with Mr. and Mrs. Butler when the tenancy of the premises was first granted in 1908.

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[1] Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12 (1) (*g*): "The expression 'tenant' "includes the widow of a tenant "dying intestate who was residing "with him at the time of his death, "or, where a tenant dying intestate "leaves no widow or is a woman, "such member of the tenant's family "so residing as aforesaid as may be "decided in default of agreement by "the county court."

On March 16, 1953, Judge Hodgson made an order, dated April 1, 1953, rescinding the order of the registrar.

Miss Butler now appealed.

The court took the point that the application expressed to be pursuant to section 12 (1) (*g*) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, was misconceived and that all the proceedings which followed were without jurisdiction.

G. H. Rountree for the applicant (Miss Butler), whilst submitting that the reference to the expert and the subsequent stages in the history of the litigation were irregular and that a rehearing ought to be directed, sought to maintain that the original application was valid, contending that even if it could not be made under section 12 (1) (*g*) of the Act of 1920 and the rules made thereunder, it was open to the court to make a declaratory judgment under section 17 (2). So long as the jurisdiction in fact existed it was immaterial that the parties had thought that it derived from section 12 (1) (*g*).

John Bassett Q.C. and *Peter Dow* for the landlord (Miss Hudson) supported the applicant's submission as to the validity of the original application and sought further to establish that each of the other stages in the litigation was valid.

[In addition to the cases cited in the judgments the following case was referred to in the argument: *Kelton* v. *Carmichael.*[2]]

EVERSHED M.R. This is a most unfortunate case. Indeed, it may, I think, not unfairly be described as a chapter of misadventures. [His Lordship referred to the application made by Miss Butler as set out above and continued:] It is plain that the application purported to be under rules 1 and 19 of the Increase of Rent and Mortgage Interest (Restrictions) Rules, 1920. At the very first step, therefore, the applicant made a serious mistake, for, in my view, the application which she made was not one which it was competent for her to make under those rules. That, however, is a matter to which I will return. I must first complete the narrative of misadventure. So far as the respondent is concerned, and was at all material times concerned, she never disputed the validity of that application as falling within the rules 1 and 19.

The next step that was taken was that the question raised by the application was remitted to the decision of the registrar. It was suggested by Mr. Rountree that that order may have been made by the registrar himself, but Mr. Bassett told us that Judge Hodgson in fact made it, though he gave no written order or direction to that effect. Such a remission was, of course, only competent if the application was within the ambit of the rules, and I have already indicated that I think it was not. However that may be, the matter was so remitted, the registrar heard certain witnesses and came to a conclusion which he expressed, without following the form of the prayer in the application, as follows: "Declaration that the applicant is the statutory tenant of No. 117, Gatton Road, Tooting." The respondent, being dissatisfied with that decision, proceeded to avail herself (still acting on the supposition that the matter was properly within rules 1 and 19) of the power given by rules 7 and 19 to apply to the judge to vary the registrar's decision.

Rule 19 of the Increase of Rent and Mortgage Interest (Restrictions) Rules, 1920, provides: "Where, on the death of a "tenant intestate, a member of his family requires the decision "of the court under the latter part of section 12 (1) (*g*) of the "Act, the judge shall give such directions as to the procedure "to be followed, and the notices to be given to and the attend- "ance of all such persons as may be interested as he shall think

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[2] 1947 S.C. (Sh.Ct.) 60.

"fit, and he (or the registrar, if so directed by him) shall consider "what may be urged (either orally or in writing) by or on behalf "of such persons, and thereupon give his decision: provided "that the registrar's decision may be varied by the judge pursuant to rule 7." Rule 7 provides: "Any application under "these rules may be made to the registrar, subject to the "following provisions:— . . . (*b*) The judge may vary or rescind "any determination or order made by the registrar, and may "make such determination or order as may be just: (*c*) An "application for such variation or rescission shall be made on "notice in writing in accordance with the county court rules as "to interlocutory applications."

I have read those two rules for the purpose of drawing attention to the following matters: first, from the language of rule 19 it appears that upon an application within it, that is, an application under the latter part of section 12 (1) (*g*), the form of procedure to be followed is not elsewhere laid down, but is to be directed by the judge; second, as I have earlier indicated, the judge may direct the registrar to consider the matter and to give his decision; third, and in the event of the judge so directing, the registrar's decision may be "varied" by the judge pursuant to rule 7.

The passages from rule 7 which I have read (and which are not exclusively applicable, of course, to rule 19) speak of the power of the judge to "vary or rescind" a determination by the registrar. It may, perhaps, be a matter of inelegant drafting, but it is to be noticed that, according to rule 19, there is power to ask the judge to vary, but not to rescind, the order of the registrar made under that rule. Mr. Bassett suggested that in rule 19 variation should be treated as including variation of so far-reaching a character as to amount to rescission. I am not satisfied that that is right. Indeed, I think that the language of rule 19, speaking only of variation, lends support to the view which I have taken that this case is not within rule 19 at all. However that may be, the judge proceeded not to vary but to rescind the registrar's order (and this is one of the items in the chapter of misadventures).

The form, however, of the application to Judge Hodgson has also given rise to some difficulty. The application read: "Take notice that the respondent intends to appeal to the judge "for an order varying or rescinding the order made by the "registrar." The form of the notice was that the respondent intended to appeal and when the case came on that application to Judge Hodgson, Miss Butler, the original applicant, asked for a direction about calling further evidence. That matter was debated on December 11, 1950, and Judge Hodgson made a note, which is a kind of interlocutory judgment, in which he dealt with his powers and duties as regards fresh evidence when a case originating under rule 19 was brought back to him on an application to vary under the same rule. As Judge Hodgson gave careful consideration to the matter and as he later indicated that he would be glad to have the guidance of this court on the point, it may be convenient for me to say a word or two on it, although in the events which I have already indicated it does not strictly arise in the present case.

Judge Hodgson, influenced, it may well be, by the form of the respondent's notice, that is, of her intention to "appeal," said in the course of his interlocutory judgment: "A party must put " forward his whole case at once. He must not add to it to meet " objections arising on the way, or present his case piecemeal. " There must be some finality. I find no such provisions," that is a reference to the provisions of Ord. 58 relating to appeals to this court, " in the County Court Rules, but section 100 of " the County Courts Act, 1934, authorizes the adoption and application of the Rules of the Supreme Court in all cases where " there is not special provision in the County Court Rules. " Accordingly, I propose to follow the usual procedure. I shall " hear and consider the evidence already given orally before the " registrar, as set out in his careful note, and I shall then come " to my own decision thereon after hearing the submissions of " the parties. I shall not consider myself bound by the findings " of fact of the registrar. But, except for very good and " sufficient cause, I shall not receive any further evidence." It is plain from that passage (and it is, indeed, conceded in this court) that Judge Hodgson was of opinion that when an application was made under rule 19 to vary a decision by the registrar, the application was in effect an appeal, and the question what evidence the county court judge should receive, other than the recorded evidence of the registrar, was to be decided on the same principles as those on which this court decides whether or not to admit fresh evidence on the hearing of an appeal. In my judgment, that is not a correct view.

It seems to me that, although there may be an application to the county court judge to vary the registrar's decision, the judge is still acting as a judge of first instance. I think, therefore, particularly if the sole question before the judge is one of

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fact, that his duty (subject, of course, to the limits imposed by a proper exercise of judicial discretion) is to hear such evidence as either party may desire to lead before him. He may well not feel bound to hear orally all the evidence which has been given before the registrar; though again, if the question is whether the registrar has reached a correct conclusion on a matter of fact, prima facie the judge would not interfere with that conclusion (certainly if it depended upon the credibility of the witnesses) unless he heard the witnesses himself. But I think, as I have already said, that since the judge is dealing with this matter as a court of first instance, he should hear such fresh evidence, relevant to the question at issue, as either party may desire to bring before him.

We were referred to two cases, one in the Court of Appeal, *British and Argentine Meat Co. Ld.* v. *Randall*,[1] and *Gregson* v. *Prior*,[2] which was cited to Judge Hodgson. Neither of those cases directly covers the question with which I am dealing in the present case, but I think that, in principle, they lend support to the view which I take, that on an application under rules 19 and 7 to vary a registrar's decision, the judge is acting not in an appellate capacity but as a judge of first instance. That, however, is by the way, and I have only thought it right to express those views because of the care taken by the county court judge and his expressed desire for guidance on this matter. I hope, therefore, that what I have said may be of assistance in similar cases.

To return to the narrative of the litigation; the next time the case came before Judge Hodgson was on January 8, 1951. On that occasion counsel for the respondent suggested that, since in the opinion of the registrar a vital question was whether, in 1923, "Mrs." or "Mr." had been written upon a rent book, the well-known handwriting expert, Mr. Gurrin, should be invited to assist the court. There was further discussion about the propriety of hearing any further evidence, particularly in view of what Judge Hodgson had said as recently as December 11, 1950, but counsel for the respondent made the tactically wise suggestion that he would, in any case, pay Mr. Gurrin's expenses, and that, I think, largely succeeded in overcoming the resistance of Miss Butler's solicitor.

The form of order which Judge Hodgson made was: "Refer "to Gurrin under section 90 for inquiry and report on three

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[1] [1939] 4 All E.R. 293.

[2] (1925) 42 T.L.R. 7.

" documents," which were illustrations of handwriting, " whether, " in the opinion of Gurrin as a handwriting expert, the said " Mr. Hudson wrote ' Mr. H. Butler ' or ' Mrs. H. Butler ' on " the face of the rent book." In my judgment, here was another misadventure, for that form of reference was not within the ambit of section 90. Section 90 (1) of the County Courts Act, 1934, provides: " Subject to county court rules, the judge may " refer to the registrar or a referee for inquiry and report—(*a*) any " proceedings which require any prolonged examination of " documents," and so forth; " (*b*) any proceedings where the " question in dispute consists wholly or in part of matters of " account; (*c*) with the consent of the parties, any other " proceedings; (*d*) subject to any right to have particular cases " tried with a jury, any question arising in any proceedings."

It is said that the reference to Mr. Gurrin was under (*d*), as being a question arising in the existing proceedings, namely, the question whether Mr. Hudson had written " Mr." or "Mrs." Butler on the rent book; but, unfortunately, the reference was not, according to its terms, to a referee for inquiry and report. It was a reference to Mr. Gurrin whether, in his opinion as a handwriting expert, the vital word was " Mr." or " Mrs." The reference was, therefore, an invitation by Judge Hodgson to an expert witness to give him a piece of evidence. I have not mentioned this matter with any wish to criticise the judge, for I think that it is clear that he acted with the concurrence of the two parties. In any case, it seems clear that at some stage the respondent offered to produce Mr. Gurrin in the county court so that Miss Butler could cross-examine him, and that offer was not accepted. It is said on Miss Butler's behalf that, as there had been a reference under section 90, it did not seem useful, or even, perhaps, appropriate, to suggest cross-examination; all of which illustrates that it is highly desirable to adhere, and to adhere fully, to the words of the Acts and the rules which are being invoked. As I have said, I think that the consent of the parties to what was done explains the technical error that was made, but it is, undoubtedly, one other misadventure in this calamitous chapter of accidents.

Mr. Gurrin made his report, and judging by the form, he seems to have had his attention directed more closely to the words of the section than had Judge Hodgson when he made his order. By consent of the parties, further documents were subsequently put before Mr. Gurrin, and on these he made a second or supplementary report.

On March 16, 1953, two-and-a-half years having elapsed since the initiation of the proceedings, the solicitor for Miss Butler returned to the charge with an application to the judge to call another witness. It was pointed out that Miss Butler and her advisers had not asked to be allowed to call that witness when, in December, 1950, they had asked for permission to call another witness, and Judge Hodgson, no doubt recollecting what he had said then (though it must have become a little dim in his recollection), rejected the application to call this further evidence. It might have been important evidence, as I shall later indicate, but at any rate it was rejected, and on April 1, 1953, he made the order which I have already mentioned. By his order in terms going outside rule 19, under which he was purporting to act, he "rescinded" the order made by the registrar; and it is from that order of rescission of April 1, 1953, that this appeal comes to this court.

[His Lordship referred to the facts stated above and continued:] As to the law applicable, there is, I gather, no dispute. If Mr. Butler was the original tenant, then since before his death there had been increases in rent, it is conceded that he was a statutory tenant at his death. It is, therefore, clear that Mrs. Butler's continued occupation must have been in right of her claim to be the tenant within the meaning of the Rent Acts, by virtue of section 12 (1) (*g*) of the Act of 1920; and it is further conceded that, on that hypothesis, when Mrs. Butler died, the utility of section 12 (1) (*g*) to the Butler family having been exhausted, Miss Butler could no longer invoke its provisions to protect her occupation. If, on the other hand, Mrs. Butler was the tenant ever since 1908, then as it is admitted that in all other respects Miss Butler satisfies section 12 (1) (*g*), she is entitled to rely on that section as qualifying her to be called the "tenant" within the meaning of the Rent Restriction Acts. The only question is, therefore, one of fact, and it is simple to state, but, as this litigation, which has gone on for about two-and-a-half years, shows, it is difficult to determine. The question is, who was the tenant of 117, Gatton Road, when the contract of tenancy came into existence?

Section 12 (1) (*g*) of the Act of 1920 provided: "The expression 'tenant' includes the widow of a tenant dying intestate" —these words were subsequently amended, but the amendments are not material to the present case—"who was residing with him at the time of his death, or, where a tenant dying intestate leaves no widow or is a woman, such member of the tenant's "family so residing as aforesaid as may be decided in default "of agreement by the county court." Those last words make it tolerably plain that where there is more than one member of the tenant's family so residing, there is express jurisdiction in the county court to decide, in default of agreement, which one of the family is to be entitled to the continued protection of the Act. The reference "as may be decided by the county court" obviously contemplates that application may have to be made to the county court to decide that matter in the circumstances which I have mentioned.

The rules of 1920, which were made pursuant to section 17 (1), deal (among other things) with applications which might have to be made under one or other of the sections of the Act of 1920 in which such applications were contemplated. To take one other example, section 2 of the Act of 1920 deals with the increases of rent which are permissible, and subsection (1) (*a*) contains the proviso that the tenant may apply to the county court for an order suspending or reducing an increase on the grounds stated. Similarly, sections 5, 6 and 9 contain other instances in which by the Act express provision is made empowering one or other party to the tenancy to apply to the county court for a specific purpose. The rules were made under section 17 (1) for the purpose of giving effect to those provisions. Section 17 (1) provides: "The Lord Chancellor may make such rules and give such "directions as he thinks fit for the purpose of giving effect to "this Act." The heading of the rules is "Applications under "section 2; section 9; section 12 (1) (*g*) or section 12 (3); section "6; or section 5 (6)," and rule 1 is: "An application to the county "court under the Act . . . (*d*) by a member of the tenant's "family under section 12 (1) (*g*) . . . may be made . . . in all "other cases," which are the relevant words here, "to the court "in the district of which the premises are situate." I have already read rules 7 and 19, so far as relevant, and pointed out that in the case of applications under section 12 (1) (*g*) by a member of the tenant's family the procedure is to be determined by the judge, who will decide, among other things, upon whom such an application will be served.

An application under section 12 (1) (*g*) is, to my mind, plainly an application for the purpose of determining, where there has been failure to reach agreement, which member of the tenant's family residing with him is to be entitled to the benefit of the Act. Such an application is expressly provided for in the latter part of section 12 (1) (*g*). An application, such as was made in this case, by the sole claimant after a parent's death to be entitled to the benefit of the statutory tenancy is not, properly speaking, an application under section 12 (1) (*g*) at all. Section 12 (1) (*g*) is a definition section. If Miss Butler is right in what she alleges, then she is a " tenant " within the meaning of the Rent Restriction Acts and, as such, is entitled to the protection against eviction which is given, for example, by section 3 of the Act of 1933. I think that the significance of that point is exemplified by the form which the order took and, indeed, by the form of the application itself. The present appellant asked for a declaration that she succeeded to the statutory tenancy. That, in a very loose way, might be described as an application under section 12 (1) (*g*), if by it is meant an application that she was the " tenant " within the meaning of the definition section.

It is to be noted that the registrar made his order, no doubt in a form which he thought really met the point in the case, as follows: " Declare that the appellant is the statutory tenant of " 117, Gatton Road." An application to be declared a statutory tenant is not, to my mind, an application under section 12 (1) (*g*), which, as I have already said, is a definition section only. I have come to the conclusion, therefore, that where, as in this case, there is no question of competing claims between members of the family, and only one possible " tenant," the matter is not, within the meaning of rule 19, an application under the latter part of section 12 (1) (*g*). The result is that all the proceedings which took place upon the footing that it was such an application, including the judge's direction to the registrar to decide the matter and the later application to Judge Hodgson to vary his decision, seem to me to have been without the necessary foundation or jurisdiction.

One other point may be mentioned to emphasize the view which I have expressed: the point taken by the respondent here, the landlord, has nothing to do with deciding which member of the family is entitled to the occupation of this house. The landlord's point, and it is the only issue in the case, is that Mr. Butler, and not Mrs. Butler, was the original tenant. That is the question which the court is asked to determine, and that question does not arise under section 12 (1) (*g*) at all, and there is no dispute between the parties which concerns the application of section 12 (1) (*g*).

I refer, finally, to the point which I noted earlier, namely, that by the terms of rule 19 when the registrar has made a decision an application to the judge is limited to the purpose of varying the registrar's decision and not rescinding it. If the question be which one of two or more competing claimants is within the definition in section 12 (1) (*g*) of the Act of 1920, "variation" is the appropriate, and the only appropriate, word. But if the question be, as it is here, whether or no the sole claimant is within the terms of the paragraph, then the application to the judge would be not to vary, but to rescind the order made by the registrar, which was, of course, what Judge Hodgson in fact did on March 16, 1953.

For those reasons, therefore, I come to the conclusion that this whole proceeding, from its inception onwards, was not properly within the rules under which the applicant purported to bring it and under which the respondent was content to debate it. I should be very sorry, when parties have travelled for two-and-a-half years along a particular litigious road to tell them that the road which they have chosen was the wrong one and that they must start again; but there are other grounds on which, as it seems to me, the present decision of Judge Hodgson could not be regarded as satisfactory, and, on any view of the case, therefore, I think that the matter would have to be re-tried or reconsidered. I have already referred to the view which, as I think with all respect, Judge Hodgson mistakenly took in rejecting applications for further evidence, and to the misfortune in the form of the direction to Mr. Gurrin to give his opinion as an expert. Even if the technical difficulty of jurisdiction was out of the way, the result would be inevitably much the same and the misfortunes which have befallen the present case and the litigants involved in it, I venture to think, clearly illustrate the troubles which may arise if parties do not follow the rules but attempt to steer a course of their own devising in determining disputes between them.

The view which I have expressed about rules 1 and 19 is not, however, the end of the case, for, alternatively, it has been suggested, both parties having been on the matters so far considered united in the view they have put forward, that, though the matter was without rules 1 and 19, and was not, properly speaking, an application under section 12 (1) (*g*) at all, the application was, nevertheless, one which the court could competently decide as falling within the general language of section 17 (2) of the Act of 1920. That subsection is: "A county court shall have "jurisdiction to deal with any claim or other proceedings arising "out of this Act or any of the provisions thereof, notwithstand"ing that by reason of the amount of claim or otherwise the case "would not but for this provision be within the jurisdiction of a "county court, and, if a person takes proceedings under this "Act in the High Court which he could have taken in the county "court, he shall not be entitled to recover any costs."

It is, I think, tolerably plain that that subsection is directed, primarily at any rate, to giving to the county court jurisdiction over all matters arising under the Rent Acts, even though, by reason of the value of the property or for other reasons, the High Court would have had jurisdiction. Had it not been for the two words "or otherwise," it would, in my judgment, have been impossible to contend that the present application for a declaration that, on the death of Mrs. Butler, Miss Dorothy Butler succeeded to the statutory tenancy, was within the terms of section 17 (2). It has, however, been argued by both sides with considerable force that the county court's powers to make declaratory judgments are limited by the County Courts Act, 1934, so as only to be available when the declaration sought is ancillary to other relief, and it is said that the words "or otherwise" have the effect, therefore, of giving to a county court jurisdiction, admittedly a discretionary jurisdiction, to make a declaratory judgment in any case, even though the declaration sought is not ancillary to any money or other claim.

I do not think that it is necessary to express any concluded view whether that submission is right, and I am, indeed, anxious not to do so, because if section 17 (2) gives the county court power to make declaratory judgments, it is obvious that there may be very many cases in which that would be a most useful jurisdiction which would well serve the interests of litigants in the county court. I must say, however, that such a declaration would not be a very suitable way of dealing with a case of this kind. It may be that this case is exceptional, and that there is in truth no dispute between the parties on any point whatever except the question, who was, in fact, the original tenant; but, if that is so, this case is indeed most exceptional. My limited experience has taught me to expect that when a landlord seeks possession of rent restricted premises and the defendant raises a claim that he is a tenant by virtue of the definition, that is not likely to be the only issue raised.

Further, applications for declaratory judgments do not appear to me very well adapted to cases in which the only question is one of pure fact. Certainly, the unhappy experience in this case is no strong advertisement for the use of section 17 (2) in the present instance. But I do not desire, for the reasons which

I have already given, to express any further opinion about subsection (2), because I am unwilling, unless compelled to do so (which I am not), to express an opinion which would limit the utility which may reside in this subsection. Assuming, however, that an application of this kind and on these facts, in other words, assuming that this particular case, was a matter within the competence of the county court under section 17 (2), what is the consequence? In my judgment, if the parties attempt to tread this road, they can go hardly any further along it than they went along the road labelled "rules 1 and 19," for, in order to sustain the subsequent proceedings, the first step in the action, the reference to and decision by the registrar, must be justified. That reference, which I assume was made by Judge Hodgson (though Mr. Rountree, as I have already stated, thought that it had been made by the registrar), was expressly made under rule 19 of the Rules of 1920, which, for reasons already given, has no application. The only other way by which the matter could have been referred to the registrar would have been by application of section 90 of the County Courts Act, 1934.

It is, in my judgment, quite plain that the direction by Judge Hodgson to the registrar to hear and to decide the case was not a reference to the registrar for inquiry and report under any of the provisions of section 90 (1). The result, therefore, is that the decision of the registrar was made without jurisdiction and was a nullity, and it follows that all the subsequent proceedings which depended upon it had no greater validity. On any view of this case, therefore, it seems to me that the answer that this court must give is that these proceedings have been wholly ineffective, and I think that the only order this court can make is, perhaps reciting in the order the opinion of the court that the original application to the registrar was invalid and outside the jurisdiction of the registrar to determine, to discharge the order made by Judge Hodgson on April 1, 1953, and also, in case that revives the registrar's earlier order, to discharge his order also.

The result is the unhappy one that the parties now find themselves, so far as I can see, exactly where they were when they started these proceedings about two-and-a-half years ago.

The issue, which may have to be decided, would be far better decided, being purely a question of fact, in a proceeding by the landlord for possession of the premises; but whether she takes that or any other proceedings, or whether, in the light of what I have said, another start is made under section 17 (2), assuming that the court has the necessary jurisdiction under that provision, is a matter for the parties themselves. The discharge of the orders made in the present proceedings is, of course, entirely without prejudice to the right of either party to take such other proceedings as she may think fit in the county court by summons for possession, or otherwise. Both parties seem to have been most unfortunate in their experience in this case and both, if I may say so, have contributed to the misadventures to which I have already sufficiently alluded. Both parties in this court were anxious to persuade us that there was jurisdiction for the proceedings which had been taken, though one of them wished the registrar's order to be preferred to that of Judge Hodgson.

In those circumstances it seems to me that the most fair and just order as to costs would be that neither party is to recover any costs here or below from the other.

BIRKETT L.J. I am of the same opinion. The situation which confronted the advisers of Miss Butler and Miss Hudson was most unusual. [His Lordship referred to the facts and continued:] It was not that Miss Butler was being turned out of the premises, but there was a threat that the premises might be sold, and so it was felt that some step must be taken to give assurance to Miss Butler about her position. The step which was taken was to make the application under rules 1 and 19 of the rules of 1920. [His Lordship referred to the claim by Miss Butler to succeed to the statutory tenancy and to the respondent's defence and continued:] I agree that rules 1 and 19 are, when examined, not applicable to the facts of this case as we know them; but no question was raised by anybody about them, and the matter was, therefore, remitted to the registrar, and he considered the matter and made his decision. [His Lordship referred to the finding by the registrar that in 1923 Mr. Hudson had written "Mrs." Butler on the rent book, and to his statement in giving his decision, that: "That is the important part of the case":] As my Lord has already indicated, Miss Hudson then desired to go to the judge to rescind or to vary the order of the registrar under the provisions of rule 7. I should like to add my concurrence with the view that Judge Hodgson under that rule was not acting as an appellate judge, but was acting as my Lord has indicated, as a judge of first instance. It is clear, in my opinion, that the proceedings which Miss Butler began and which were resisted by Miss Hudson, were, for the reasons stated by my Lord, a nullity.

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Birkett L.J.

At one time in this case I was a little startled about the procedure on the reference to Mr. Gurrin, because it looked as though his expert opinion, given in writing, was allowed to be used in evidence without giving Miss Butler any chance of cross-examination; but a closer view of the facts, I think, indicates that what really happened was that Mr. Bassett said: "The "registrar has decided this case upon a matter of handwriting, "purporting to act as an expert. What I really desire is to have "the opinion of an expert, and to have this rent book and the "other relevant documents submitted to a handwriting expert, "Mr. Gurrin, and I will pay for his opinion." Thereupon, it appears that counsel for Miss Butler said: "In that event, I "cannot resist," and when the reports ultimately came before Judge Hodgson there was no objection taken to them. The only thing that was said, and quite properly said, was: "Well, they "are not decisive or conclusive in any way. They are merely a "factor in the case"; but I agree, as my Lord said, that the purported reference to Mr. Gurrin was not sent to him as a referee under section 90 at all; it was really putting Mr. Gurrin in the position of an expert witness giving evidence in the case.

It is not necessary for the decision of this case to express a view about the true meaning of section 17 (2) of the Act of 1920; though I should like to indorse the language used by the Master of the Rolls when he said that it would be a pity if anything were said in this case to limit the operation of the rule in its utility or, indeed, its application to other cases brought under the Rent Acts. [His Lordship read section 17 (2) and said:] The wording of that provision suggests that what was being emphasized was "We have committed to the county court these "questions relating to the Rent Acts. It may very well be that "in certain claims and proceedings under those Rent Acts the "question of jurisdiction may come into issue, either because of "amount or for some other reason," and on the face of it what the section was saying was: "Notwithstanding that questions of "jurisdiction which ordinarily would oust the jurisdiction may "conceivably arise, nevertheless the county court shall still have "power to deal with the matter."

It was submitted by both Mr. Rountree and by Mr. Bassett that the strict wording of the Act, "a claim arising out of this "Act," would cover proceedings such as the proceedings in the present case, and reference was made to a case where, in the county court, apparently, it had been held that the court had power to make a declaration notwithstanding that no money was claimed, thus going contrary to the usual county court rule that a declaratory judgment must be ancillary to the claim in the action. In my view the facts as we now know them would seem at any rate in this case to make it extremely doubtful whether the proper course, or the advantageous course, was to seek a declaratory judgment, but, as we are determining the matter on the first point, that is, that the proceedings from the beginning, because of the course they took, were irregular and are, indeed, a nullity, then I agree with what the Master of the Rolls has said, that because these proceedings which have been taken are ineffective, this court will discharge the order of Judge Hodgson, without prejudice to anything the parties may choose to do in the future.

ROMER L.J. I agree entirely with the judgment which has been delivered by the Master of the Rolls. For the reason which he has elaborated in his judgment, the parties, both the applicant and the respondent to these proceedings, altogether misapprehended the effect of rules 1 (*d*) and 19 of the rules made under the Act of 1920. It is plain that all the problems which have arisen since the beginning of this unfortunate litigation two years ago, have flowed directly from that mistake.

I would like to reserve my concluded view as to what is the precise scope of section 17 (2) of the Act of 1920, but I agree with my Lords in thinking that it would be undesirable to say anything which might confine the apparent meaning of the subsection, and I can well conceive that in some cases, particularly cases raising short questions of law, it would be desirable for the county courts to have the suggested jurisdiction to make declarations of rights in disputes arising under the Acts wider than their normal jurisdiction under the county court procedure. Beyond that, as I say, I prefer to say nothing about that subsection.

I agree with the order which my Lord has indicated.

Appeal allowed.
Orders of the county court judge and the registrar discharged. No order as to costs.

Solicitors: *W. Timothy Donovan; Warren & Co.*

E. D.

REGINA *v.* TWICKENHAM RENT TRIBUNAL. *Ex parte* DUNN.

1953
July 22.

Lord Goddard C.J., Parker and Donovan JJ.

Landlord and Tenant—Rent tribunal—Flat—Determination of rent—Application to rent tribunal—Not authorized by tenant—Applicant deserted wife of tenant—Whether wife agent of husband—Landlord and Tenant (Rent Control) Act, 1949 (12 *&* 13 *Geo.* 6, *c.* 40), *s.* 1.

The tenant of a rent-controlled flat deserted his wife and left the flat, notifying the landlord that he had ceased to have any interest in the tenancy. The wife continued to occupy the premises and paid the rent. She applied to a rent tribunal under section 1 of the Landlord and Tenant (Rent Control) Act, 1949, for a reduction in the rent, making the application as agent for her husband. The tribunal decided that they had no power to consider the application. On a motion for an order of mandamus directing the tribunal to hear and determine the application:—

Held, refusing the order, that the wife was not entitled to make the application since she was not the tenant, and she had been unable to show any express authority from her husband; that no such authority could be implied from her position as special licensee of the premises, as that position entitled her merely to remain in possession so long as she paid the rent and performed the covenants, and she did not by virtue of her position become her husband's agent so as to entitle her to exercise a right which her husband as tenant could have exercised; and that there was no authority at common law which conferred on a wife any right to act as agent for her husband other than the right to pledge his credit for necessaries where he had not provided for her.

Old Gate Estates Ld. v. *Alexander* [1950] 1 K.B. 311; 65 T.L.R. 719; [1949] 2 All E.R. 822; *Middleton* v. *Baldock* [1950] 1 K.B. 657; 66 T.L.R. (Pt. 1) 650; [1950] 1 All E.R. 708; *Bendall* v. *McWhirter* [1952] 2 Q.B. 466; [1952] 1 T.L.R. 1332; [1952] 1 All E.R. 1307 considered.

MOTION for an order of mandamus.

The applicant was the wife of Douglas William Dunn, the tenant of a flat at Royston Court, Spencer Road, Chiswick, the flat having been demised to him by one A. Stokes at a monthly rent of £19 10s. 0d. The tenancy was a letting within section 1 of the Landlord and Tenant (Rent Control) Act, 1949.[1] On March

[Reported by Mrs. E. M. WELLWOOD, Barrister-at-Law.]

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[1] Landlord and Tenant (Rent Control) Act, 1949, s. 1: "(1) Where " apart from this section the stan- " dard rent of a dwelling-house would " be—(a) the rent at which it was let " on a letting beginning after Sep- " tember 1, 1939, . . . then, subject " to the provisions of this section, the

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25, 1949, Dunn deserted his wife and left the flat, subsequently notifying the landlord that he had ceased to have any interest in the tenancy. The applicant, the wife, remained in occupation and continued to pay the rent. In May, 1952, she applied to the Twickenham rent tribunal under section 1 of the Act of 1949 for determination of the rent, describing herself in her application as the tenant of the flat. The tribunal refused to entertain the application on the ground that she was not the tenant. On December 3, 1952, she applied again as agent for her husband, the tenant.

At the hearing before the tribunal on January 28, 1953, it was contended on behalf of the applicant that as she was in possession of the premises as a special form of licensee of her husband, the tenant, she had a right derived from him to assert on his behalf the tenant right in the premises, which included the right to make that application. On behalf of the landlord it was contended that the application could only be made by the tenant; that it could not be made without his authority, and that he had given no such authority.

The tribunal decided that they had no power to consider the application and notified the applicant to that effect on February 12, 1953.

She now moved for an order of mandamus directing the tribunal to hear and determine the application.

Roger Willis and *E. H. Laughton-Scott* for the applicant. A deserted wife is entitled to remain in possession of the matrimonial home and to enjoy any rights to which her husband, the tenant, is entitled either under the contract of letting or, where the premises are rent controlled, under the Rent Acts, so long as she pays the rent: *Old Gate Estates Ld.* v. *Alexander*[2]; *Brown* v. *Draper*[3]; *Middleton* v. *Baldock*[4]; *Bendall* v. *McWhirter*.[5] On those authorities the wife is a licensee who occupies the premises by virtue of her husband's tenancy. Since a tenant, in certain circumstances, has the right to apply to a rent tribunal under section 1 of the Act of 1949 for the fixing of a reasonable rent, it is only logical to allow a deserted wife who remains in the

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"landlord or the tenant may make "application to the tribunal to determine what rent is reasonable for "that dwelling-house, and on any "such application the tribunal shall "determine that rent. . . ."

[2] [1950] 1 K.B. 311.

[3] [1944] K.B. 309; 60 T.L.R 219; [1944] 1 All E.R. 246.

[4] [1950] 1 K.B. 657.

[5] [1952] 2 Q.B. 466.

matrimonial home, and who pays the rent, to exercise that right, since she should only be required to pay a reasonable rent. The deserted wife is unable to apply to the tribunal in her own name since she is not the tenant, but there is nothing in the Act to prevent her from making the application in the name of her husband, the tenant. It is conceded that, if the court is not satisfied that the husband has given his wife an irrevocable authority enabling her to make such an application, then this motion must fail. [*Wabe* v. *Taylor*[6] was also referred to.]

Murray Band for the landlord. The source of the special protection which has during the last 10 years been afforded to a deserted wife is to be found in *Bramwell* v. *Bramwell.*[7] That special protection flows from immunities and not from positive rights. A husband cannot terminate a wife's licence to remain in the matrimonial home unless she commits a matrimonial offence, nor can he retake possession of the premises except under section 17 of the Married Women's Property Act, 1882: *H.* v. *H.*[8] The passage in Denning L.J.'s judgment in *Bendall* v. *McWhirter*[9] in which he deals with the wife's authority is obiter, and that case was decided on a narrower point. The wife is protected and has a right to remain in the matrimonial home only so long as her husband's tenancy is in existence. There is no legal duty on the wife to pay the rent, but if she does not do so the landlord would be entitled to terminate the husband's tenancy. The husband tenant is legally liable for the rent; there is no way in which the landlord could sue the wife for it. In this type of case the ordinary laws of landlord and tenant have been submerged in order to give a special protection to a deserted wife. Those laws should not be submerged further than is necessary to give her that protection and there is no justification for extending the wife's rights.

J. P. Ashworth, for the rent tribunal, as amicus curiae. The authorities cited were concerned with the right of a deserted wife to remain in possession of the matrimonial home. The present case is concerned with a positive right in the wife: *Bradley-Hole* v. *Cusen.*[10] The true nature of the wife's right here is distinctly sui generis. It has been established by the authorities that a deserted wife is a licensee and not a tenant, and she cannot therefore apply to a rent tribunal for consideration of the rent under section 1 of the Act of 1949. In *Bendall* v. *McWhirter* [11] Denning L.J.[12] compared the wife's occupancy to that of a contractual licensee. It is submitted that the contract is with the husband. The wife's right qua the premises may be summarized as being the right to remain in occupation on the terms of her husband's statutory tenancy: *Old Gate Estates Ld.* v. *Alexander*,[13] *per* Denning L.J., who stated that the deserted wife "can "pay the rent and perform the obligations of the tenancy." One cannot fairly add to that statement that she should also be entitled to exercise the rights of the tenancy on the husband's behalf.

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[6] [1952] 2 Q.B. 735; [1952] 2 T.L.R. 264; [1952] 2 All E.R. 420.

[7] [1942] 1 K.B. 370; 58 T.L.R. 148; [1942] 1 All E.R. 137.

[8] (1947) 63 T.L.R. 645; sub nom. *Hutchinson* v. *Hutchinson* [1947] 2 All E.R. 792.

[9] [1952] 2 Q.B. 466, 477.

[10] [1953] 1 Q.B. 300; [1953] 2 W.L.R. 193; sub nom. *Hole* v. *Cuzen* [1953] 1 All E.R. 87.

[PARKER J. Denning L.J. in *Bendall* v. *McWhirter* [14] suggested that a wife could sublet some of the rooms of the matrimonial home. It is difficult to know how that can be done if she is not her husband's agent.]

It is difficult to suggest that the wife is her husband's agent, for in some cases she occupies the premises against his wish and an agent must act in the interests of his principal. It may be that it is an agency of necessity for which she has presumed authority. The object of the Act of 1949 was to deal with standard rent, and it is submitted that there is force in the construction that the wife should only be obliged to pay the appropriate standard rent. The rent applies in rem irrespective of the person who is in occupation of the premises. A deserted wife's rights in respect of her possession are negative; she has no positive rights under the tenancy. [*Errington* v. *Errington and Woods* [15] was also referred to.]

Laughton-Scott, in reply, referred to *Bendall* v. *McWhirter*, *per* Denning L.J.[16] The wife has a right of her own to assert the tenant right no matter what her husband wishes, but against the landlord the wife must assert the right in her husband's name. That is what she is seeking to do in this case. The position arises because an occupier who is paying rent for her occupation of the premises is not a tenant. It would be wrong if the landlord were allowed to benefit under such anomalous circumstances by obtaining a higher rent from the deserted wife than he would be able to charge if the husband were still residing with her.

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[11] [1952] 2 Q.B. 466.

[12] Ibid. 477.

[13] [1950] 1 K.B. 311, 320.

[14] [1952] 2 Q.B. 466, 477.

[15] [1952] 1 K.B. 290; [1952] 1 T.L.R. 231; [1952] 1 All E.R. 149.

[16] [1952] 2 Q.B. 466, 477.

LORD GODDARD C.J. The circumstances are these: The flat was demised by Stokes to Mr. Dunn at a certain rent, and is one to which the Landlord and Tenant (Rent Control) Act, 1949, applies. Mr. Dunn and Mrs. Dunn have parted, and I am willing to assume for the purposes of this case that the husband deserted the wife, and that she is to be regarded as in the position of a deserted wife. Mrs. Dunn, having been granted maintenance by the High Court of £500 a year, finding that the rent reserved imposed a strain upon her, applied to the tribunal to reduce the rent. She applied first in her own name, and that application was rejected by the tribunal, in my opinion quite rightly, because she was not the tenant of the house. She then sought, and seeks in this case, to avoid the consequences of that decision by applying on behalf of her husband as his agent. The case is one which has never arisen before, and it illustrates the inconveniences and difficulties which arise where one has to apply a statute which interferes with freedom of contract. Undoubtedly this is a rent restricted flat, subject to the control of the Rent Acts, and a tenant cannot be ejected so long as he pays the rent and performs the covenants of the lease.

The question then arises as to the true position of the wife who has been deserted by her husband but who continues to live in the house. The husband cannot sue his wife for ejectment, and a series of decisions, more particularly *Old Gate Estates Ld.* v. *Alexander*,[1] *Middleton* v. *Baldock*[2] and *Bendall* v. *McWhirter*,[3] have established that if a wife is deserted by her husband she has a right to remain in the matrimonial home and, if that matrimonial home is one subject to the Rent Restriction Acts, she cannot be dispossessed so long as she pays the rent and performs the covenants.

As I understand the ratio decidendi of the decisions in the Court of Appeal, the wife becomes a licensee of a very special character. The mere fact that she is the wife gives her an implied authority from the husband to remain in possession of those premises; and she can remain in possession so long as she pays the rent and performs the covenants. In this case the husband has given notice, as was done in other cases which have been the subject of decisions in the Court of Appeal, that he does not claim or desire to remain in the flat. It has not yet

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[1] [1950] 1 K.B. 311; 65 T.L.R. 719; [1949] 2 All E.R. 822.

[2] [1950] 1 K.B. 657; 66 T.L.R. (Pt. 1) 650; [1950] 1 All E.R. 708.

[3] [1952] 2 Q.B. 466; [1952] 1 T.L.R. 1332; [1952] 1 All E.R. 1307.

1953

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Lord Goddard
C.J.

been directly decided, so far as I am aware, whether in such circumstances the husband who is willing to give up the house to the landlord who desires possession, but is unable to give vacant possession because the wife remains in the house, continues to be liable for the rent, but I will assume for the moment that he does. The husband does not pay the rent, but the wife does, and so long as she pays the rent to the landlord he cannot, by reason of the Rent Restriction Acts, recover possession of the house. But that does not seem to me to make the wife the husband's agent. The husband may have given the wife authority to remain in the house, but he has not, in my opinion, given her authority to act as his agent.

It is an authority of a very special and anomalous character with which the wife has been clothed by the law as laid down by the Court of Appeal. She is there in this special capacity of a licensee. Her licence cannot be revoked by the husband, and her possession cannot be assailed by the landlord so long as he receives the rent; but I cannot see that those cases in the Court of Appeal have given her any further positive rights. The only passage which, in my opinion, can be prayed in aid is in Denning L.J.'s judgment in *Bendall* v. *McWhirter*,[3] in which he said[4]: "The authority"—that is, the authority to remain in the house—"is, of course, purely personal to her. She alone "can exercise it. She cannot assign it. It does not give her "any legal interest in the land. She may perhaps sublet some "of the rooms so as to help keep herself; but even then, she "does so, not out of any legal interest of her own in the land "but on the presumed authority of her husband." No other judgment of any Lord Justice has gone as far as that, and it should be observed that that is only dictum; the Lord Justice does not purport to decide that she can sublet some of the rooms, but only that perhaps she may sublet some of the rooms. In fact, I think that that point is distinctly left open even on the Lord Justice's judgment, but so far as the position of the wife as agent for her husband is concerned, I know of no doctrine of the common law which confers an authority on the wife except to pledge her husband's credit for necessaries. That is the extent of the authority which a wife has as agent for her husband. She can, for instance,—to take an ordinary case not complicated by the Rent Restriction Acts—if she is deserted by her husband, take rooms, lodgings, or possibly a house on the credit of her husband if she can find anybody who will let a house to her on the terms that he would have to recover the rent from the husband because the wife had authority to pledge his credit.

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[3] [1952] 2 Q.B. 466.

[4] Ibid. 477.

But, speaking for myself, I am not prepared in this court to extend the privileges or position of the wife to the extent that she can exercise a right which her husband as tenant could have exercised, because she is not the tenant of the house. The only person who can apply to have the rent reduced is the tenant, and these cases do decide that the wife is not the tenant of the house. If she is not the tenant, I do not see how she can have the right to go to a tribunal and ask for a reduction of the rent. I think that it is undesirable to confer that right upon her.

If a person takes a house and agrees to pay the rent, he would normally consider that he ought to pay the agreed rent. In this case, the husband has never complained about the rent he agreed to pay. He has not asked, and does not wish to ask the tribunal to decide that the landlord is charging an excessive rent. Why should the wife, because she chooses to remain in the house, be entitled to say to the tribunal that the rent which the husband agreed to pay, did pay and has always been willing to pay while he lived in the flat, was excessive? Why should she be entitled to ask the tribunal to break a contract which the husband made with the landlord and which he has never sought to repudiate? I can find nothing in the cases in the Court of Appeal which either oblige or, indeed, entitle me to hold that the wife is the agent for the husband so as to exercise any right which the husband might exercise.

The only agency there is in a wife is to pledge the husband's credit in a case where the husband has not provided for her. In this case, the wife has £500 a year for herself and £100 for the child of the marriage. That is by an order of the court, and therefore she cannot say that provision has not been made for her by her husband. In my view she has not shown any case or decision which would oblige me to hold that she can exercise this authority, or that she has any express authority from her husband, or any implied authority, merely because she is clothed with this particular special position as a licensee, which would entitle her to apply to the tribunal. If a wife is to be clothed with that authority, I think that it must be by a decision of the Court of Appeal, because by their decisions she is put in an exceptional position. The position is that she pays the rent and performs the covenants so that she may be entitled to remain in the flat. By an order of the Divorce Court the wife in this case has been provided by her husband with a sum of money and with that money she can pay her rent and thus be entitled to remain in the house. That is the extent of her rights and obligations.

For these reasons I think that the tribunal were justified in refusing to entertain her application, and this motion must fail.

PARKER J. I agree so entirely with what my Lord has said that I do not think that I can usefully add anything.

DONOVAN J. Section 1 of the Landlord and Tenant (Rent Control) Act, 1949, allows a tenant to make an application to the tribunal for reduction of rent. The applicant before us is not the tenant. The regulations made under the Act contemplate that at the hearing of an application the tenant may be represented by his agent. The applicant before us is not her husband's agent. We are asked to say that she should be treated as the agent of her husband for the purposes both of making the application and prosecuting it, although the husband repudiates any such agency; and it is said that we should be justified in so doing because of the judicial decisions already cited which lay down that a wife deserted by her husband has a right to "live" or "stay" in the matrimonial home on the terms of her husband's tenancy. It is merely a logical extension of this right, it is argued, to allow her to exercise her husband's statutory right to go to a rent tribunal. The decisions in question are directed to preserving a deserted wife's right to remain in the matrimonial home, and it is not necessary to the preservation of that right that the wife should have a further right to apply for a reduction of rent. If that were granted to her, it would, in my view, not be a logical extension of her rights as a licensee under a presumed irrevocable licence from her husband, but a new departure altogether and a bridging of a void which has been left, wittingly or unwittingly, by Parliament. In my view, Parliament alone can give the right here sought, and I therefore agree with the judgments already delivered.

Application dismissed.

Solicitors: *Willis & Willis; Arthur Robson; Solicitor, Ministry of Health.*

MAURAY *v.* DURLEY CHINE (INVESTMENTS) LD.

C. A.

1953
May 20, 21;
June 17.

Singleton, Jenkins and Morris L.JJ.

Landlord and Tenant—Rent restriction—Flat with services—Option to grant new lease in original form—Rent later reduced by tribunal—Option exercised—Refusal to grant new lease—Whether option valid and validly exercised—Contract—Legality—Furnished Houses (Rent Control) Act, 1946 (9 *&* 10 *Geo.* 6, *c.* 34), *ss.* 2, 4 (1), 9.

Landlords leased to a tenant a flat for a term of seven years from June 24, 1946, at a yearly rent of £525 and covenanted to provide certain services for the benefit of the tenant which brought the flat within the purview of the Furnished Houses (Rent Control) Act, 1946. By a deed dated March 30, 1949, the landlords granted the tenant an option to take a new lease for a further seven years on the expiry of the original lease, and it was provided by the deed that the new lease should be in the same form as the existing lease; that the tenant should exercise the option on or before June 24, 1952, by a notice in writing to the landlords; and that on the exercise of the option by the tenant the landlords should grant the new lease "forthwith." At the end of 1949 the tenant applied to a rent tribunal for a reduction of his rent, and on January 23, 1950, the tribunal, exercising its powers under section 2 (2) of the Furnished Houses (Rent Control) Act, reduced the rent to £425 a year. On December 7, 1951, when the Act of 1946 was due to expire on March 31, 1953, the tenant exercised the option by serving on the landlord a notice requesting a renewed lease for a further term from June 24, 1953, "at the yearly rent of £525 (reduced to £425 "for the duration of the Furnished Houses (Rent Control) Act, "1946 . . .)." The landlords refused to grant the new lease. Thereupon the tenant claimed a declaration that the option was valid and subsisting and that it had been validly exercised:—

Held, first, that, since at the time when the lease ought to have been executed, the whole of the term to be granted fell outside the period then fixed for the duration of the Act, the defendants could not escape their obligation to grant the new lease on the ground that since that time the duration of the Act had been extended, and the option was accordingly not void for illegality.

Semble, had the duration of the Act of 1946, when the new lease ought to have been granted, extended beyond June 24, 1953, the landlords would have been relieved since the new lease could not then lawfully have been granted at a recoverable rent of £525 a year.

Held, secondly, that the notice exercising the option was valid. The inclusion in the notice of the words "reduced to £425 for the "duration" of the Act of 1946 could only reasonably be construed as being declaratory of the legal effect of granting the lease on the terms offered in the option agreement, and could not be held to vitiate the notice.

[Reported by Mrs. E. M. WELLWOOD, Barrister-at-Law.]

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The plaintiff was, accordingly, entitled to the declaration, subject to the proviso that for the duration of the Furnished Houses (Rent Control) Act the lease to be granted pursuant to such declaration would, as regards the amount of rent payable thereunder, take effect subject to the provisions of the Act and to any decision of the rent tribunal for the time being in force.

Decision of Gerrard J. [1953] 1 W.L.R. 524 affirmed on different grounds.

APPEAL from Gerrard J.

The following statement of facts is taken substantially from the judgment of the court: By a lease dated December 14, 1946, made between the defendants, Durley Chine (Investments) Ld., and the plaintiff, Maurice Mauray, the defendants demised to the plaintiff flat No. C. 1 in a building known as Durley Chine Court, Bournemouth, for the term of seven years from June 24, 1946, at the yearly rent of £525 payable quarterly in advance, with a provision for the payment by the plaintiff as an additional rent of such further amount as the defendants might be called upon to pay for general rate, poor rate and water rate, or any of them, in respect of the flat over and above the amount payable at the date of the commencement of the said term. The covenants on the part of the defendants as lessors included a covenant to pay all rates and taxes in respect of the flat except for gas and electricity used in it, and also included covenants to provide certain services for the benefit of the plaintiff as tenant of the flat. The defendants' covenants in regard to the provision of services admittedly had the effect of bringing the letting within the purview of the Furnished Houses (Rent Control) Act, 1946.[1] It was not in

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[1] Furnished Houses (Rent Control) Act, 1946, by s. 1 (1) provides for the application of the Act to any district by order of the Ministry of Health on representation by or after consultation with the local authority concerned, and s. 1 (2) provides for the setting up of a tribunal constituted as therein mentioned for each district in which the Act is in force.

S. 2 (1): "Where a contract has, "whether before or after the passing "of this Act, been entered into where- "by one person (hereinafter referred "to as the 'lessor') grants to another "person (hereinafter referred to as "the 'lessee') the right to occupy as "a residence a house or part of a "house situated in a district in which "this Act is in force in consideration "of a rent which includes payment for "the use of furniture or for services ". . . it shall be lawful for either "party to the contract or for the local "authority to refer the contract to the "tribunal for the district, and where "any such contract (hereinafter re- "ferred to as 'a contract to which "'this Act applies') is so referred "to the tribunal, they may by a "notice in writing served on the "lessor require him to give to them, "within such period (which shall not "be less than seven days from the "date of the service of the notice) as "may be specified in the notice, such dispute that at all times material to the present appeal the Act was applicable in the district in which Durley Chine Court was situate.

" information as they may reasonably " require regarding such of the prescribed particulars relating to the " contract as are specified in the " notice.

" (2) Where any contract to which " this Act applies is referred to a " tribunal, then, unless at any time " before the tribunal have entered " upon consideration of the reference " it is withdrawn by the person or " authority by whom it was made, " the tribunal shall consider it and, " after making such inquiry as they " think fit, and giving to each party " . . . an opportunity of being heard, " or, in his option, of submitting " representations in writing, shall " approve the rent payable under the " contract or reduce it to such sum as " they may, in all the circumstances, " think reasonable, . . . or may, if " they think fit in all the circumstances, dismiss the reference, and " shall notify the parties and the local " authority of their decision in each " case.

" (3) Where the rent payable for " any premises has been entered in " the register in accordance with the " provisions hereinafter contained, it " shall be lawful for the lessor or the " lessee or the local authority to refer " the case to the tribunal for reconsideration of the rent so entered on " the ground of change of circumstances, and the provisions of subsection (2) of this section shall apply " on any such reference in like manner as they apply on a reference " under subsection (1) of this section " subject to the modification that the " tribunal shall have power to increase " the rent payable."

S. 3: " (1) The local authority shall " prepare and keep up to date a " register for the purposes of this Act, " and shall make the register available " for inspection in such place or " places and in such manner as the " Minister may direct.

" (2) The register shall be so prepared and kept up to date as to " contain, with regard to any contract " under which a rent is payable that " has been approved, reduced or increased under the last foregoing " section (being a contract relating to " premises situated in the area of the " local authority), entries of—(*a*) the " prescribed particulars with regard to " the contract; (*b*) a specification of " the premises to which the contract relates; and (*c*) the rent as " approved, reduced or increased by " the tribunal, and, in a case in " which the approval, reduction or increase is limited to rent payable " in respect of a particular period, a " specification of that period.

" (3) It shall be the duty of the " tribunal, when they notify, under " subsection (2) of the last foregoing " section, the local authority of their " decision in a case, to furnish to the " local authority such particulars as " are requisite for enabling them to " discharge their functions under the " foregoing provisions of this section."

S. 4: " (1) Where the rent payable " for any premises is entered in the " register under the provisions of this " Act, it shall not be lawful to require " or receive—(*a*) on account of rent " for those premises in respect of any " period subsequent to the date of such " entry, (or, in a case in which a particular period is specified, in respect " of that period) payment of any sum " in excess of the rent so entered; . . . " (2) where any payment or consideration has been made or received in " contravention of the foregoing subsection, the amount or value thereof " shall be recoverable by the person " by whom it was made or given."

S. 9 (1): " A person who requires " or receives any payment or any " consideration in contravention of " section four of this Act shall be " guilty of an offence and be liable on " summary conviction to a fine not " exceeding one hundred pounds or to " imprisonment for a period not

A dispute arose between the parties concerning the provision in the lease for the payment as additional rent of the amount of any increase in the rates payable by the defendants as therein mentioned. That dispute led to an action in the Chancery Division in which the present defendants were plaintiffs and the plaintiff was defendant. The action was compromised on terms which included the giving by the present defendants to the present plaintiff of the option contained in an agreement under seal dated March 30, 1949, and made between the defendants and the plaintiff. After a recital to the effect that the terms of settlement of the Chancery action included the granting by the defendants to the plaintiff of the option thereinafter contained, it was witnessed (so far as material for the present purpose) as follows:

"1. In pursuance of the said term of settlement and in consideration of the premises the lessee shall have the option of "taking a lease of the several rooms bathrooms and servants' "offices known as flat No. C. 1 on the second floor of the building "known as Durley Chine Court Bournemouth in the County of "Hants for a term of seven years from June 24, 1953, at the "yearly rent of £525 such lease to be in the form of the existing "lease of the said premises dated September 4"—a mistake for December 14, 1946, on which no point was made in the case—"and made between the lessors of the one part "and the lessee of the other part except that there shall be "substituted in clause 1 for the words 'at the date of the "'commencement of the said term' the words 'on June 24, "'1946'."

" . . . 4. The said option shall be exerciseable by notice in "writing to the lessors at any time before or on June 24, 1952, "and if and when the same shall be exercised then the lessors "shall forthwith grant and the tenant shall accept a lease of the "said flat on the said terms of the said premises to commence "from June 24, 1953. . . . In the event of the option being "exercised the lease and a counterpart thereof shall be prepared

"exceeding six months or to both "such fine and such imprisonment, "and, without prejudice to any other "method of recovery, the court by "which he is found guilty may order "the amount paid or the value of the "consideration given to be repaid to "the person by whom the payment "was made or the consideration "given."

S. 13 (3) provides that the Act (which came into force on March 26, 1946) shall continue in force until December 31, 1947, but it has been from time to time continued. The Expiring Laws Continuance Act, 1951, s. 1 (2) provided that, the Act shall continue to March 31, 1953, and it was further continued by the Expiring Laws Continuance Act, 1952, s. 1 (2) to March 31, 1954.

" by the lessors' solicitors at the expense (including stamps) of " the lessee and shall be executed by the lessors and lessee " respectively."

Within a year after the execution of such agreement the plaintiff, with a view to improving his position yet further, applied to the rent tribunal for Bournemouth and area constituted under the Act of 1946 for a reduction in the rent payable in respect of the flat. His application succeeded to the extent that on January 23, 1950, the tribunal issued a notification of their decision to fix the rent of the flat at £425 per annum " for the " duration of the Furnished Houses (Rent Control) Act, 1946," but subject to the right of the defendants, or the plaintiff, or the local authority, to refer the case to the tribunal for reconsideration of the rent so fixed on the ground of change of circumstances. The formal date of notification of that decision to the parties and to the local authority for registration was stated therein to be February 2, 1950. The reduced rent of £425 per annum was duly entered in the register kept by the local authority pursuant to section 3 of the Act of 1946.

By a notice dated December 4, 1951, and enclosed in a letter from his solicitors to the defendants, dated December 6, 1951, the plaintiff purported to exercise the option given by the agreement of March 30, 1949. That notice was in the following terms: " To: " Durley Chine (Investments) Limited, 63 Coleman Street, " London. I, Maurice Mauray of Flat C. 1, Durley Chine Court, " Bournemouth, hereby give you notice that in exercise of the " option in that behalf given by an agreement dated March 30, " 1949, and made between yourselves of the one part and myself " of the other part do hereby request you to grant to me a renewed " lease of the premises demised by a lease dated December 14, " 1946, and made between yourselves of the one part and myself " of the other part for a further term of seven years from June 24, " 1953, at the yearly rent of £525 (reduced to £425 for the " duration of the Furnished Houses (Rent Control) Act, 1946, by " the decision of the rent tribunal for Bournemouth and area " notified on February 2, 1950) such lease to be in the form of the " said lease except that there shall be substituted in clause 1 " thereof for the words ' at the date of the commencement of the " ' said term ' the words ' on June 24, 1946,' and I agree to accept " such renewed lease and do all such acts and things as under " the said lease to be done by the lessee in relation to the grant " of such lease. Dated this fourth day of December, 1951. " (Signed) Maurice Mauray."

A copy of the notice was at the same time sent to the defendants' solicitors, and elicited from them the following reply dated December 7, 1951: "Dear Sirs, Re: Flat C. 1, Durley "Chine Court. We are in receipt of your letter of yesterday with "its enclosure. In view of what has happened since the agreement dated March 30, 1949, was entered into by our clients and "your client, we have been advised that the option contained in "such agreement is null and void, and in the circumstances we "are not able to accept the notice enclosed with your letter, and "therefore return it herewith and would point out that in "the absence of any new arrangement with your client, our clients "will expect Mr. Mauray to vacate the premises on the expiration "of his present lease. Yours faithfully, (Signed) Evans Baker & "Co., Messrs. Jacobson, Ridley & Co., 11 Hertford Street, W.1."

The defendants' contention that in the events which had happened the option had become null and void was disputed by the plaintiff. On April 3, 1952, the plaintiff brought the present action against the defendants alleging that "by notice in writing "dated December 6, 1951, the plaintiff by his solicitors exercised "the said option and requested the defendants to grant a new "lease in pursuance thereof but the defendants by a letter by "their solicitors dated December 7, 1951, refused to do so and "contended that the said option was null and void," and claiming "A declaration that the option contained in the deed dated "March 30, 1949, is valid and subsisting and has been duly "exercised by the plaintiff."

The defendants pleaded: "4. The defendants admit the notice "and letter referred to in the statement of claim but will refer "thereto for the precise terms and effect thereof. No admission "is made as to the validity or effect in law of the said notice as "a purported exercise of the said option. 5. As a result of the "said decision of the said rent tribunal made on the application "of the plaintiff . . . the rent of £525 per annum which was "expressly stipulated in the said deed of March 30, 1949, as the "rent at which the plaintiff was given the said option of taking "a further lease of the said flat became under the provisions of "the Furnished Houses (Rent Control) Act, 1949, an unlawful "rent for the said flat which the defendants under penalties set "forth in the said Act were prohibited from requiring or receiving. "6. In the premises the said option became null and void and the "said purported exercise thereof became and is a nullity."

Gerrard J., on February 24, 1953, gave judgment for the plaintiff and granted the declaration. He held (1) that the granting of a future lease at a rent of £525 per annum would not of necessity involve illegality because the tribunal had power to increase the reduced rent if application were made; (2) that a mere covenant in a lease to pay rent in excess of the amount permitted was not a "requirement" within the meaning of section 4 (1) of the Act; and (3) that, in any event, such a covenant would not render the whole lease void. The defendants appealed.

L. A. Blundell for the defendants. The question is whether a lessee's option for the renewal of a lease at a stated rent remains a binding contract after the lessee has applied to a rent tribunal under the provisions of the Furnished Houses (Rent Control) Act, 1946, for a reduction of the rent and the stated rent has by the decision of the tribunal become unlawful. Where the lessee has brought about a state of affairs in which the lease rent has become illegal his option to renew the lease comes to an end. Once a tribunal has reduced the rent of premises to which the Act applies and that rent has been entered in the register it becomes unlawful, under section 4 (1) of the Act, for any person to "require or "receive" more than the registered rent for those premises. Any person who contravenes the provisions of that section commits an offence under the Act and is liable to a fine or imprisonment: section 9. The expression "require" is satisfied if a landlord stipulates for a particular rent in a lease and a covenant by the lessee to pay that rent. If a landlord puts before a lessee an agreement for a new lease at a higher rent than that fixed by the tribunal for the premises, and causes the lessee to enter into a covenant to pay that rent, he is "requiring" a forbidden rent. The registered rent applies to the premises and to all subsequent contracts of letting relating to those premises for the period specified by the tribunal or until altered by the tribunal on further application on the ground of change of circumstances: *Rex* v. *Fulham, Hammersmith and Kensington Rent Tribunal, ex p. Gormly.*[2] Therefore, had the landlords entered into a new lease at £525 per annum at the date they were required to do so by the terms of the option agreement, even though the term of the new lease did not begin to run until June, 1953, they would have been committing an offence under the Act because they would have been "requiring" an illegal rent.

In those circumstances the option agreement entered into in 1949 became impossible of performance by virtue of the provisions of the Act. The court will not specifically enforce a contract where its terms have become prohibited by law: see *Rees* v. *Marquis of Bute*,[3] where Younger J. refused to grant a decree of specific performance where payments agreed under a contract had become illegal and irrecoverable by virtue of the passing of the Rent Restrictions Interest (War Restrictions) Act, 1915. See also dictum of Evershed J. obiter in *Brilliant* v. *Michaels*.[4] The lessee, when he sent his notice exercising his option, recognized that he could not ask plainly for a new lease at £525 a year. He tries to establish by cy-près that he is entitled to something else. If the contract cannot lawfully be carried out the lessee is not entitled to damages, and he is not entitled to something different from that which was agreed under the contract. The court will not alter a contract which has become incapable of performance by reason of some uncontemplated turn of events: *per* Lord Simon in *British Movietonews Ld.* v. *London and District Cinemas Ld.*[5]

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[2] [1952] 1 K.B. 179; [1951] 2 T.L.R. 1037; [1951] 2 All E.R. 1030.

[SINGLETON L.J. In that case Lord Simon thought that Denning L.J. in his judgment in the Court of Appeal had put an interpretation on *Sir Lindsay Parkinson & Co. Ld.* v. *Commissioners of His Majesty's Works and Public Buildings*[6] that was too wide. You go further. You say that the contract between the parties has become illegal.]

The landlord being prohibited by statute from carrying out the contract in terms, he is entitled to be relieved entirely from his obligation: *Rees* v. *Marquis of Bute*, *per* Younger J.[7] The notice of December 7, 1951, was not a valid exercise of the option since it added words which were not provided for by the agreement. A landlord cannot be compelled to execute a document in different terms from those agreed between the parties: *Hollies Stores* v. *Timmis*,[8] *per* Russell J., citing *Finch* v. *Underwood*.[9]

[SINGLETON L.J. Was this point raised in the court below?]

The point was clearly raised in the pleadings. It was considered in general terms, but not developed, before Gerrard J. The due exercise of the option was never conceded.

R. F. Levy Q.C. and *P. Bristow* for the plaintiff. It is conceded that the new lease could not have been granted if it had been illegal to do so at the appropriate time. By the terms of the option agreement, if the option were exercised, and the landlord could lawfully grant a new lease, he was under an obligation to do so forthwith. The defendants' submission that it would have been contrary to law to grant the new lease will not bear scrutiny. Assuming that the Act of 1946, coupled with the decision of the tribunal, applied to the premises and fixed the rent of the flat for all future contracts of letting, and did not apply only to the particular contract, the period for which the rent was fixed was for the duration of the Act at the time the decision was made. At that date the Act was due to expire on March 31, 1953. At some time between December 7, 1951, when the option was exercised, and March 31, 1953, when the Act was due to expire, the landlords could lawfully have granted the new lease which was not to commence until after the expiry of the Act. There was nothing in the Act or in the decision of the tribunal to prevent them from so doing. The lessee was entitled to the new lease and the landlords are not entitled to take advantage of their own default. The lessee should be put in the position in which he would have been had the lease been granted at the time the landlords were called upon to do so.

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[3] [1916] 2 Ch. 64; 32 T.L.R. 425.

[4] [1945] 1 All E.R. 121; 114 L.J. Ch. 5.

[5] [1952] A.C. 166; [1951] 2 T.L.R. 571; [1951] 2 All E.R. 617.

[6] [1949] 2 K.B. 632; [1950] 1 All E.R. 208.

[7] [1916] 2 Ch. 64, 74.

[8] [1921] 2 Ch. 202, 205.

[9] (1875) 2 Ch.D. 310.

The landlords' contention that the rent fixed by the tribunal applies to the premises and controls all future contracts of letting is fallacious. The submission is based on the decision of the Divisional Court in *Rex* v. *Fulham, Hammersmith and Kensington Rent Tribunal, ex p. Gormly*,[10] but the Court of Appeal is not bound by that decision. Section 4 of the Act, read in conjunction with sections 2 and 3, merely means that it shall not be lawful to require or receive more rent under the existing contract than the tribunal has laid down.

[SINGLETON L.J. Section 4 is wide enough to cover any subsequent contract of letting once the rent fixed by the tribunal has been registered in accordance with section 3.]

[JENKINS L.J. If it is not so, what is the purpose of a register?]

It is agreed that if section 4 is read alone the tribunal's decision would extend to all subsequent contracts. If the principal submission for the plaintiff is wrong, a landlord, by fulfilling a contractual obligation to execute a lease which is not to take effect until a future date, does not "require" payment of rent. "Require" means "ask for" or "endeavour to obtain." It is submitted that an agreement to receive is not a requirement

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[10] [1952] 1 K.B. 179.

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within the meaning of section 4. Had it been intended to make such a provision in the Act it would have been easy to do so.

A tribunal's decision to reduce the rent in an existing lease does not invalidate the lease but merely substitutes a lower rent for the rent stated in the lease: *W. H. Brakespear & Sons Ld.* v. *Barton.*[11] That principle applies in this case. The effect in futuro is that the decision of the tribunal does not affect the lessee's right to continue the lease, although it may modify the rent recoverable under it. The lessee has an absolute right under this option agreement to have a new lease at a rent of £525 a year. It is for the landlords to establish that the contract has become illegal and to satisfy the court that if they enter into the contract the rent must be limited to £425 a year. That was the point on which Gerrard J. based his judgment.

The defendants' submission on the validity of the notice has never been raised specifically before, although it is conceded that it is covered by the pleadings. They ought not to be allowed to raise that issue at this stage.

[SINGLETON L.J. The court must consider the point of law.]

The notice clearly states that it is the exercise of the option given by the agreement, namely, a request for a new lease at £525 a year. The additional words are mere surplusage, a comment on the rent reserved in the lease.

[JENKINS L.J. Must those words not mean "so long as the "Act of 1946 is in force I can only pay a rent of £425 a year?"]

Even if that is their meaning they do not detract from the unqualified exercise of the option.

Bristow, following. The additional words in the notice are merely descriptive of the effect of the tribunal's decision on the rent lawfully payable for the period specified by the tribunal.

Blundell, in reply. The option agreement sets out the terms in which the option may be exercised. There are no words in the agreement which can be interpreted as giving the tenant the right to exercise it on different terms. There is no question but that by his notice the lessee is expecting the landlords to grant a lease at a reduced rent. Whether or not the rent of £525 has become an illegal rent need not be decided. The plaintiff's contention that the tribunal's decision affects only the particular contract is wrong. The Act intends that the decision should bind all future lettings: *Rex* v. *Fulham, Hammersmith and*

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[11] [1924] 2 K.B. 88; 40 T.L.R. 607.

Kensington Rent Tribunal, ex p. Gormly,[12] in which the question was canvassed thoroughly; that case was rightly decided.

Cur. adv. vult.

June 17. SINGLETON L.J. The judgment which Jenkins L.J. is about to read is the judgment of the court.

JENKINS L.J. stated the facts and the terms of sections 2, 3, 4 and 9 (1) of the Act of 1946. After stating the facts regarding the proceedings before the rent tribunal and the registration of the reduced rent he said: It thus became unlawful by reason of section 4 (1) of the Act, for the defendants to require or receive on account of rent for the flat any sum in excess of the rent of £425 per annum entered in the register on pain of fine or imprisonment or both (see section 9 (1) of the Act). Moreover, any sum received by the defendants in contravention of section 4 (1) would be recoverable from them by the person paying it. That state of affairs would, moreover, continue for the duration of the Act of 1946, subject to the possibility of the defendants being able to secure an increase in the registered rent on a reconsideration of it by the tribunal on the ground of change of circumstances under section 2 (3) of the Act.

His Lordship continued: It will be seen that, while the defendants kept open the question whether the notice relied on by the plaintiff was, or was not, a valid and effective exercise of the option on the footing that the option itself was valid and subsisting at the time of its purported exercise, the substance of their case, as foreshadowed in their pleading, appeared to be that the Act of 1946, coupled with the tribunal's decision to reduce the rent of the flat to £425 per annum, and the registration of the rent as so reduced, had the effect of making the option void for illegality, because it thenceforth became unlawful for the defendants to grant a lease at the rent of £525 provided for in the option agreement, or, at all events, to demand or receive that rent under any lease granted pursuant to the option agreement and purporting to reserve that rent. It is clear that before Gerrard J. the argument for the defendants was directed exclusively to the issue of illegality. The judge rejected the defendants' contentions on this issue, and as it was the only issue argued before him, it necessarily followed that he held the plaintiff entitled to the declaration claimed, and gave judgment accordingly.

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[12] [1952] 1 K.B. 179, 186.

From that judgment the defendants now appeal to this court, and Mr. Blundell, on their behalf, has relied not only on the argument based on illegality (which the judge considered and rejected), but also on a further argument, not raised before the judge, to the effect that in any case the notice of December 4, 1951, was not a valid exercise of the option even if (contrary to his contention) the option itself was still valid and subsisting at the date of its purported exercise by the plaintiff.

To deal first with the argument based on illegality. We may say at once that we agree with the judge's conclusions, though we prefer to put our reasons for coming to that conclusion in a somewhat different way. For the purposes of this argument the vital points seem to us to be these. First, on the assumption that, apart from the question of illegality, the notice purporting to exercise the option was a valid exercise of it, the option was exercised when the letter enclosing it was received by the defendants, that is, apparently, on December 7, 1951; secondly, the option agreement provided that on the exercise of the option the defendants should grant the plaintiff a new lease on the stipulated terms "forthwith"; thirdly, the term to be granted by the new lease was to run from June 24, 1953, the date of the expiry of the existing term; fourthly, the legislative position in regard to the duration of the Act of 1946 at the material period was that immediately before December 7, 1951, it was due to expire on March 31, 1952, to which date its life had been prolonged by the Expiring Laws Continuance Act, 1950, and that on December 7, 1951, the Expiring Laws Continuance Act, 1951, further extended its duration until March 31, 1953.

The argument based on illegality is put in two ways. First, it is said that the mere granting to the plaintiff of a lease for seven years from June 24, 1953, at the rent of £525 per annum would (in view of the reduction by the tribunal of the rent payable for the flat to £425 per annum and the registration of the rent as so reduced) in itself amount to a "requiring" by the defendants of rent in excess of the rent entered in the register, and thus constitute a transaction in terms made unlawful by section 4 (1) of the Act, and a contravention of that section punishable as an offence under section 9. Alternatively, it is said that in these circumstances the option agreement has become illegal in the sense that its terms, as contemplated by the parties, can no longer be lawfully carried out, demanding, as they do, a lawful and recoverable rent of £525 per annum.

Whichever way it is put, we do not see how the argument

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can be maintained in the face of the four vital points to which we have referred. It is, perhaps, just conceivable that the grant of a lease taking effect in possession at a given rent might be said in itself to amount to a "requiring" of that rent within the meaning of section 4 (1), though we are far from so holding. It is hardly conceivable that the granting of a lease to take effect from some future date at a given rent to become payable from and after that future date should in itself be held to amount to such a "requiring," and, as at present advised, we would not so hold.

But, however these two hypothetical cases may stand, the actual position in the present case was that (apart from any defect in the notice itself) the option was exercised, and the defendants became obliged, according to the terms of the option agreement, to grant the lease "forthwith," on December 7, 1951. Thus, allowing the most lenient interpretation to the word "forthwith," the defendants ought to have granted the plaintiff a lease at £525 per annum for a term of seven years commencing from June 24, 1953, at a time when the whole of that future term fell beyond the date (namely, March 31, 1953) then fixed for the duration of the Act of 1946. It seems to us quite impossible to hold that the mere granting of a lease at a given rent to take effect from a date after the date for the time being fixed for the duration of the ~~Act~~ of 1946 amounts to a "requiring" of that rent in contravention of any of the provisions of that Act. If the duration of the Act is subsequently extended so as to embrace wholly or in part the term granted by the lease, then in respect of so much of the term as falls within the extended duration of the Act the lessor will be precluded from requiring or receiving more than the registered rent. But he cannot, in our view, be said to have "required" more than the registered rent by granting a lease at a given rent to take effect from a future date at which, as the law stands at the date of the grant, the Act of 1946 will have expired and the registration of rents thereunder will have ceased to have any legal effect.

Nor, in our view, can it be said that an agreement to grant a lease from a future date which, when the time comes for granting the lease according to the terms of the agreement, falls after the date for the time being fixed for the expiration of the Act of 1946, is impossible of performance because the rent reserved exceeds the registered rent, so that if such expiration is subsequently postponed to a date overlapping the commencement of the term to be granted, the excess of the contractual over the registered rent will not be lawfully recoverable. In such a case, it seems to us that the agreement to grant the lease, at the time fixed for its performance, is perfectly legal and must be performed accordingly, and the lessor must take his chance of his right to recover the full rent reserved by the lease, when the time for payment of such rent arrives, being defeated by some further extension of the duration of the Act of 1946.

We are, accordingly, of opinion that the argument based on illegality must fail.

There remains the new point, not taken below, to the effect that on the footing that the option was still valid and subsisting at the date when the plaintiff purported to exercise it, his notice purporting to do so was not a valid exercise of the option. Although this point was not argued below, it was, as has appeared above, open on the pleadings, and as it is a point of law arising on undisputed facts, we think that we would be wrong to exclude it from consideration here. It is, however, only right that a new point taken at this late stage should be somewhat jealously scrutinized.

The argument on this point turns entirely on the inclusion in the notice of December 4, 1951, of the words "reduced to "£425 for the duration of the Furnished Houses (Rent Control) "Act, 1946, by the decision of the Rent Tribunal for Bourne-"mouth and area notified on February 2, 1950," which follow the words "for a further term of seven years from June 24, 1953, "at the yearly rent of £525." Apart from the inclusion of the additional words we have quoted, the document appears to be in point of form unexceptionable as a perfectly good exercise of the option. But it is suggested that these additional words have the effect of making the lease called for by the notice of December 4, 1951, a lease in different terms from those of the lease offered by the option agreement. If that were indeed the case, the point would, as it seems to us, be unanswerable. An option to take a lease at a specified rent is not well exercised by a notice demanding a lease at some lower rent. But we do not think it is possible, on a reasonable construction of the additional words, to attribute to them a meaning which would have the effect of vitiating the notice on that ground. It would, we think, be a strained construction of the words in question to interpret them as demanding a lease at the rent of £525 per annum reduced to £425 per annum for the duration of the Act of 1946, irrespective of any upward revision of the permitted rent which might be made by any further decision made by the tribunal upon a reconsideration of the case under section 2 (3) of the Act.

It is true that the reference is to the tribunal's decision notified on February 2, 1950, which is described as reducing the rent to £425 for the duration of the Act, but that is no more than a perfectly accurate description of the tribunal's decision as it stood at the date of the notice and still stands; and we do not think that it can fairly be construed as impliedly depriving the defendants of the benefit of any upward revision of the permitted rent which might be made by the tribunal after the date of the notice, whether before or after the execution of the lease or the commencement of the further term thereby granted. Giving the best consideration we can to the construction of the words in question, with due regard to the surrounding circumstances and to the provisions of the Act, we do not think that they can fairly be held to be anything more than declaratory of the legal effect of the granting of a lease on the terms offered by the option agreement, the lease called for by the notice being nothing more nor less than a lease strictly in those terms. In our view, the disputed words are really no more than a parenthetical reference to the fact that while the lease to which the plaintiff was entitled, and for which he called by the notice exercising the option, was a lease for seven years from June 24, 1953, at the rent of £525 per annum and otherwise in the form prescribed by the option agreement, the rent would, during so much of the term as might fall within the duration of the Act of 1946, be reduced to £425 per annum by the tribunal's decision notified on February 2, 1950, so long as that decision remained in force.

We are, accordingly, of opinion that the new point based on the alleged invalidity of the notice exercising the option also fails, with the result that the appeal fails and must be dismissed.

It is not without regret that we reach this conclusion, for the case is one in which the provisions of the Act of 1946 appear to us to work an injustice upon the defendant landlords. It is an undesirable, though it may be unavoidable, by-product of this enactment that a man negotiating under no pressure, and upon equal terms, is thereby enabled to take a lease for a term of years at a specified rent, and at any time after he has secured the lease obtain from the appropriate tribunal a substantial reduction in the rent to which he has freely agreed, while nevertheless holding the landlord to his side of the bargain. It is, no doubt, true that the whole object of the Act, designed as it is to prevent landlords from exploiting a shortage of accommodation, would be stultified if contracting out were permitted, or if landlords were enabled to rescind the leases of tenants for terms of years who availed themselves of the statutory right to apply for a reduction in their rents. It is, no doubt, also true that it would be difficult, and it may be impracticable, to limit the application of the Act in such a way as to confine its operation to cases of real hardship or oppression. But one cannot help feeling that in practice advantage is taken of the Act by tenants in no need of protection—tenants, for example, who are in a position to take flats of a class commanding rents of several hundred pounds a year—for the purpose of benefiting themselves at the expense of their landlords and in derogation of bargains freely and deliberately made. In other words, the Act, which was designed to prevent the exploitation of tenants by landlords, may in such cases be made an engine for the exploitation of landlords by tenants.

In the present case, the hardship upon the defendants is twofold. Not only have they had to submit to a reduction of their rent from £525 to £425 during the latter part of the term originally granted, but they are now under an obligation to grant a lease for a further term of seven years during part, and it may well be the whole, of which the rent of £525 stipulated for by them, and agreed to by the plaintiff in the option agreement, will be similarly reduced. We would willingly have held them relieved from the last-mentioned obligation had we been able to find any justification in law for so doing. If at the time when the new lease ought to have been granted (that is, forthwith after the exercise of the option) the duration of the Act of 1946 as then fixed had extended beyond the date of the commencement of the new term (namely, June 24, 1953), we would, as at present advised, have been disposed to hold the defendants relieved on the ground that the new lease could not lawfully have been granted at a recoverable rent of £525 per annum, and that the agreement under which it was to have been granted had accordingly become impossible of performance because it could not be legally performed. To this extent we are, as at present advised, disposed to part company with the judge, who appears to have proceeded on the ground that the possibility of some further decision of the tribunal restoring the contractual rent of £525 before the commencement of the new term sufficed to prevent impossibility of lawful performance being imputed to the option agreement at the time when the lease ought to have been granted.

We find difficulty in seeing why the defendants should have been required to accept the mere possibility of the full rent of £525 being once more lawfully recoverable as from the commencement of the new term, by virtue of a purely hypothetical further decision of the tribunal, in substitution for the right to a lawfully recoverable rent of £525 for which they had bargained and to which the plaintiff had agreed. But we see no answer to the point that at the time when the new lease ought to have been executed the new term to be granted by it fell wholly outside the period then fixed for the duration of the 1946 Act. However probable it may have been that such duration would in fact be extended so as to overlap the commencement of the new term, we cannot regard the existence of that contingency as sufficing to relieve the defendants of their obligation to grant the new lease at the time when it ought to have been granted. That being so, it follows that on the principle that "equity looks on that "as done which ought to have been done," the plaintiff should be put in the same position as he would have been in if the new lease had actually been granted at the proper time, and the defendants cannot escape their obligation to grant it on the ground that since that time the duration of the Act of 1946 has been extended to March 31, 1954.

We would therefore dismiss the appeal, though we would be disposed, in order to avoid any possibility of dispute hereafter, and to make it clear that the court is not countenancing anything inconsistent with the Act of 1946, to amplify the declaration made by the judge by adding words to the effect that for the duration of the Act of 1946 the lease to be granted pursuant to such declaration will, as regards the amount of the rent payable thereunder, take effect subject to the provisions of that Act, and to any decision of the relevant rent tribunal under it for the time being in force.

Appeal dismissed.
Leave to appeal to the House of Lords.

Solicitors: *Evans Baker & Co.; Jacobson, Ridley & Co.*

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June 29, 30;
July 16.

Singleton, Denning and Morris L.JJ.

FREDERICK E. ROSE (LONDON) LD. *v.* WILLIAM H. PIM JNR. & CO. LD.

[1952 F. No. 485.]

Contract—Rectification—Sale of goods by description—Mutual mistake as to nature of goods induced by innocent misrepresentation by sellers—Commodity A believed identical with commodity B—Concluded oral agreements for commodity B—Written contracts in like terms.

The plaintiffs, London merchants, were asked by their Egyptian house for "Moroccan horsebeans described here as feveroles." Their representative did not know what feveroles were, and asked the defendants' representative, who after making inquiries, told him that feveroles were just horsebeans and that his firm could procure them. After negotiations on that basis, written contracts were concluded (1) between North African suppliers and the defendants, (2) between the defendants and the plaintiffs, and (3) between the plaintiffs and Egyptian buyers, for the sale and purchase of "horsebeans," payment to be in London by confirmed irrevocable letters of credit against shipping documents. When the horsebeans, shipped from Tunis, were received by the Egyptian buyers, the latter found that the commodity supplied was not feveroles, but another type of bean; but as they had paid for the goods, they accepted them and claimed damages.

The resulting disputes between the plaintiffs and the defendants were referred to arbitration, and awards made in favour of the defendants. The plaintiffs then started proceedings in the High Court, claiming, inter alia, rectification of the contracts by the addition of the word "feveroles" after the word "horsebeans," intending if successful to claim damages on the contracts as rectified.

Pilcher J. found that both parties had made an oral agreement by which they intended to deal in "horsebeans of the feverole "type," but that owing to a mutual mistake innocently induced by the sellers' representative, all the written contracts were for horsebeans; and he allowed the rectification asked for by the plaintiffs. On appeal by the defendants:—

Held, that, as the concluded oral agreement between the parties was for horsebeans, and the written contracts were in the same terms, the remedy of rectification, available only where there was clear proof that a written agreement did not correspond with the contract into which the parties entered, as expressed by their outward acts, was not available to make new contracts for feveroles between the parties.

Per Denning L.J.: Though both parties were under a fundamental mistake as to the nature of the subject-matter, the contract was not a nullity, for where parties to a contract were to all outward appearances in full and certain agreement, neither of them could set up his own mistake, or the mistake of both of them, to make it a nullity ab initio.

Dictum of Simonds J. in *Crane* v. *Hegeman-Harris Co. Inc.* [1939] 1 All E.R. 662, 664, that a continuing common intention might be sufficient ground for obtaining rectification doubted by Denning L.J.

Decision of Pilcher J. [1953] 1 Lloyd's Rep. 84 reversed.

APPEAL from Pilcher J.

The plaintiffs, Frederick E. Rose (London) Ld., and the defendants, William H. Pim Jnr. & Co. Ld., carried on business as merchants and middlemen in the City of London. The plaintiffs had an associated company in Egypt—Rose (Middle East)—and the defendants an extensive connexion with North African suppliers and shippers of local products.

On October 26, 1950, Rose (Middle East) cabled to their London house: "Have inquiry Egypt up to five hundred tons "Moroccan horsebeans described here feveroles. Please offer "c.i.f. Port Said. . . ." The plaintiffs' market representative, Hampson, did not know what the French term "feveroles" meant, and telephoned to the defendants' representative, Brooks, whom he had known for some 25 years. According to the plaintiffs' evidence, Hampson read the whole cable to Brooks, and asked him what "feveroles" were. Brooks said he did not know, but would find out, and shortly after he told Hampson that feveroles meant horsebeans and that these could be obtained from Algeria, Tunisia, or Morocco.

On October 31, the plaintiffs cabled to their Egyptian house a firm offer to supply "horsebeans," stating in the cable: "Understand horsebeans exact translation feveroles." There followed various offers and counter-offers between the parties, and on November 2, 1950, three contracts were signed, as follows: (1) sale by an Algerian company to the defendants of 500 tons Tunisian horsebeans, fair average quality; (2) sale by the defendants to the plaintiffs of the like quantity and quality of Tunisian horsebeans; and (3) sale by the plaintiffs to a firm in Port Said of the same quantity of Tunisian horsebeans. On November 7, 1950, three similar contracts for a further 200 tons of Algerian horsebeans were concluded, the buyers in this case being an Egyptian firm in Alexandria.

Each contract was on form 62 of the London Corn Trade Association, and included an arbitration clause; and attached to each was a slip containing provisions as to payment, and providing that the certificate of cargo superintendents at shipment was to be final as to weight, quality, condition, and admixture. Payment was to be made by net cash against shipping documents by confirmed irrevocable letters of credit to be opened by buyers with a London bank.

In pursuance of these contracts, 500 tons of horsebeans were shipped at Tunis for dispatch to Egypt in December, 1950. The certificate of the cargo superintendents at Tunis at first described them as "feves de Tunisie," whereupon the plaintiffs told the bank not to honour the credit, as they could not accept "feves" as equivalent to horsebeans. The cargo superintendents, therefore, with the approval of both plaintiffs and defendants, altered the certificate so as to describe the goods as horsebeans—which they in fact were—and the bank paid the price in exchange for the shipping documents.

When the Egyptian buyer took delivery of the goods he at once made a complaint that the goods were not "feveroles" but "feves"; but as he had already paid for them by means of the irrevocable credit, he accepted them and claimed damages.

As a result of the misunderstanding as to what "feveroles" were, disputes arose between the plaintiffs and defendants, and were referred to arbitration. The award of the arbitrators on the contracts of both November 2 and November 7 were in favour of the defendant sellers. Appeals were entered by the plaintiffs, but stood adjourned pending the present proceedings in the High Court. Meanwhile proceedings were taken in the courts of Egypt by the buyers of the 200 tons. After an incursion into the Chancery Court, the plaintiffs began the action against the defendants in the commercial list.

By their statement of claim the plaintiffs claimed rectification of both contracts by the addition of the word "feveroles" after the words "Tunisian horsebeans" and "Algerian horsebeans" respectively, and also damages for breach of the alleged oral warranty by Brooks, the defendants' representative, namely, that he had warranted that goods described as Algerian/Tunisian/Moroccan horsebeans were goods commonly known in Egypt as "feveroles" which could be resold in fulfilment of a requirement for "feveroles," and that in consideration of such warranties the plaintiffs had accepted the defendants' offers.

Before Pilcher J. the plaintiffs abandoned their claim to damages for breach of warranty, the reason given being that the defendants had pleaded section 4 of the Sale of Goods Act, 1893, as a defence to the claim.

During the trial and the hearing of the appeal, it was

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evident that there was much uncertainty as to the meaning of "feveroles"; it appeared that there were various types of bean grown in various North African countries; a special type, denoting horsebeans of medium size, were known as "feveroles," a larger type was called "feves," and a small size "fevettes." The medium size were more valuable than the large ones; but the English word "horsebeans" appeared to cover all varieties.

Pilcher J. concluded that at the time of the conversations with Hampson, the defendants' representative, Brooks, honestly believed that "North African horsebeans described in Egypt as "'feveroles'" were in fact the same commodity as "North "African horsebeans, fair average quality," and that he had innocently misled the plaintiffs, with the result that the defendants had bought horsebeans which were not feveroles, and had passed this commodity on to the plaintiffs, who in their turn sold it to their Egyptian buyers. He said that though all the written contracts described the commodity as horsebeans, that was solely because of the mutual mistake originating with Brooks, which had been accepted by the plaintiffs. He found that both parties made an oral agreement in which they intended to deal in "horsebeans of the feverole type," and he gave judgment for the plaintiffs, on January 23, 1953, holding that they were entitled to have the two forms of contract rectified by the addition of the word "feveroles" after the word "horsebeans."

The defendants appealed.

T. G. Roche for the defendants. No one was agreed as to what exactly "feveroles" are; but Pilcher J. allowed the contract to be rectified so as to read "horsebeans (feveroles)." The question is whether, where parties to a contract think that commodities A and B are the same when in fact they are not, the court can rectify a contract for the sale of A to read as a contract for the sale of B. In certain circumstances such a "fundamental "mistake," as Pilcher J. described it, might be ground for saying that there was no contract; but it is not open to the judge, by allowing rectification, to make another contract for the parties. Here the offer was for horsebeans, and that exact offer was accepted, under a mutual mistake, for the parties did not know that feveroles had any separate existence from horsebeans. They thought that they were contracting for horsebeans which had the quality of being capable of being sold in Egypt as feveroles. In *Bell* v. *Lever Brothers Ld.*[1] it was held that if the mistake was as to the nature and substance of the thing sold there was no consent and no contract, but that if it was as to the quality of the subject matter there was no remedy, unless there was a collateral warranty: see *per* Lord Blanesburgh,[2] *per* Lord Atkin,[3] citing *Kennedy* v. *Panama, New Zealand and Australian Royal Mail Co.*,[4] where the mistake was induced by the innocent misrepresentation of the directors, and *per* Lord Thankerton on mutual error.[5]

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[1] [1932] A.C. 161; 48 T.L.R. 133.

[DENNING L.J. *Kennedy's* case[6] was decided before equity was joined with law. The rule now is that one can have rescission for material misrepresentation; but it does not affect this argument, for rectification is never a remedy for innocent mistake.]

Here there was an innocent mistake as to the quality of the commodity. Two remedies were available: (1) rescission—and if the parties had discovered the mistake in time the buyers could have rescinded. But the Egyptians kept the goods so that rescission was not possible; or (2) damages for breach of collateral warranty; but that plea was abandoned by the plaintiffs. The authorities do not show that rectification is a remedy here. If the court were to decide that Pilcher J. was right, it would be making new law in the case of innocent misrepresentation, and it would mean that for more than a century the legal profession has been under a misapprehension as to the remedies for such misrepresentation. It has always been thought that the only remedy is to strike swiftly and rescind while the contract is still executory; but if the present decision is right, one can wait five-and-a-half years and then apply to rectify and later get damages on the contract as rectified.

Where rectification is sought, the duty of the court is to rectify written instruments to bring them into accord with a prior oral contract, and the inquiry to which the court directs its mind is: did the parties at the time when they signed the written agreement intend to carry out the prior oral agreement, or had they changed their minds? Pilcher J. referred with approval to Simonds J. in *Crane* v. *Hegeman-Harris Co. Inc.*,[7] citing Clauson J. in *Shipley Urban District Council* v. *Bradford Corporation.*[8] Clauson J. held that an agreement in writing could be rectified where there was a prior oral contract, made by a public authority, which was void unless it was in writing. The question there was whether that was possible in law when there could not have been any prior agreement. But that point cannot arise here, for there was here a concluded prior oral agreement, and the question is what that agreement was. Either there was a contract for horsebeans or no contract at all: see *per* Lord Cozens-Hardy M.R. in *Lovell & Christmas Ld.* v. *Wall*[9] on the essence of rectification, and *per* Fletcher-Moulton L.J.[10] on the point that the law does not make new contracts for the parties. Thus, unless a mistake is proved, there is nothing to rectify. See also *Craddock Brothers* v. *Hunt*, *per* Warrington L.J.,[11] on "the real antecedent contract"; and *United States of America* v. *Motor Trucks Ld.*,[12] *per* Lord Birkenhead L.C., on rectification owing to common mistake where the written contract does not express the true bargain.

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[2] [1932] A.C. 161, 198.
[3] Ibid. 217–9.
[4] (1867) L.R. 2 Q.B. 580.
[5] [1932] A.C. 161, 232.
[6] L.R. 2 Q.B. 580.
[7] [1939] 1 All E.R. 662, 664.
[8] [1936] 1 Ch. 375.

[DENNING L.J. There was no prior contract to supply feveroles if they are different from horsebeans.]

The parties negotiated and came to a verbal agreement on the basis that the two things were the same. They did not come to two agreements. If the two things are in fact different, they cannot rectify.

Kenneth Diplock Q.C., *Eustace Roskill Q.C.*, *A. J. Bateson* and *J. H. A. Scarlett* for the plaintiffs. The case was pleaded on construction of the contract and rectification.

[DENNING L.J. Why did the plaintiffs abandon their claim for breach of collateral warranty?]

Because the warranty contradicted the express terms of the written contract, and where there is a contract for the sale of goods by description and there has been a parole warranty that those goods will comply with another description, which varies, modifies or contradicts the written contract, parole evidence as to the negotiations between the parties is not admissible if the oral agreement has been embodied in the written document: see *Smith* v. *Jeffryes*,[13] which is closely analogous to this case. There was there a common intention to deal in Regent's Ware potatoes and an oral agreement to supply them, but the written contract omitted the word "Regent's" and, on appeal, the court refused to admit parole evidence of the common intention.

The important element was common intention, as it is here; and, short of fraud, it mattered not how that intention was induced. The court in *Lovell & Christmas Ld.* v. *Wall* [14] mentioned the same difficulty as to the inadmissibility of parole evidence in those circumstances.

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[9] (1911) 104 L.T. 85, 88; 27 T.L.R. 236.

[10] 104 L.T. 85, 91.

[11] [1923] 2 Ch. 136, 159.

[12] [1924] A.C. 196, 200; 39 T.L.R. 723.

[13] (1846) 15 M. & W. 561.

[DENNING L.J. So the plaintiffs abandoned the collateral warranty plea on the analogy of *Smith* v. *Jeffryes* [15]?]

Yes, and many other decisions since that. While it is appreciated that rectification is a discretionary remedy, it is submitted that the plaintiffs here had no other remedy.

[MORRIS L.J. Is it submitted that in *Smith* v. *Jeffryes* [15] the contract might have been rectified today by inserting the word " Regent's " on the jury's finding that that was the parties' intention?]

Yes; those are the circumstances in which rectification is the remedy, and the only remedy. This case turns on a question of fact: was there a common intention to sell horsebeans which would comply in Egypt with the description " feveroles "? Pilcher J. has found that there was that common intention: see *Crane* v. *Hegeman-Harris Co. Inc.*,[16] which correctly laid down the law as to the remedy of rectification; and Simonds J.'s judgment, cited by Pilcher J., was confirmed in the Court of Appeal.[17]

[SINGLETON L.J. But if it is shown that the market clerks made a mistake, are the plaintiffs entitled to rectification as of right, when both parties know that there is a string of contracts and that other parties up and down the line will be affected? See Lord Hardwicke L.C. in *Henkle* v. *Royal Exchange Assurance Co.*[18] as to whether the court ought to interpose and relieve by rectifying " under the circumstances and nature of the trade."]

In the absence of estoppel, the string of contracts should not affect the case. This case does not turn on a misrepresentation. It is a question of common mistake or common intention and, once the common intention is established, that is sufficient for rectification. Unless the judge's finding that there was a common intention to make an oral agreement to deal in horsebeans of the feverole type can be upset, the right to rectification follows. It must be remembered that these transactions arose from an attempt to meet an inquiry by a buyer, i.e., to find a commodity which a potential buyer in Egypt had defined. If there is evidence on which Pilcher J. could find as he did, the plaintiffs are entitled to rectification.

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[14] 104 L.T. 85.

[15] 15 M. & W. 561.

[16] [1939] 1 All E.R. 662.

[17] [1939] 4 All E.R. 68.

[18] (1749) 1 Ves.Sen. 317, 318.

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Roche, in reply. When Simonds J. in *Crane* v. *Hegeman-Harris Co. Inc.*[19] referred to intention and said that it was sufficient to find a common continuing intention, he meant intention expressed in oral agreement, i.e., the objective intention. If he meant more than that "agreement means intention "as expressed," the court ought not, in view of the clear expressions of opinion to the contrary in the other decisions cited, to follow him.

[DENNING L.J. The question could not be: did you intend to sell it as feveroles? but only, did you agree to sell it as feveroles?]

Yes. Whether the mistake was as to nature or quality, a rectification which has the effect of making a new contract is not possible. As to the exercise of the court's discretion in allowing that remedy, see *Caird* v. *Moss.*[20]

Cur. adv. vult.

SINGLETON L.J. stated the facts and continued:—Apart from any question of law, one sees at once the difficulty caused by the uncertainty as to the meaning of "feveroles." The first cable of October 26, 1950, mentioned "horsebeans *described in Egypt* "*as feveroles*," and that cable led to discussions between Hampson and Brooks. I cannot say that it is clear from the evidence that the word "feveroles" has the same meaning everywhere, though it seems fairly clear that they are a type of horsebean.

[His Lordship then referred to the conclusions of Pilcher J. and continued:] Innocent misrepresentation may give rise to a right of rejection; that right was not exercised in this case. And it might have been possible to establish a breach of a collateral warranty. Neither of these questions arises. The sole question is as to whether the plaintiffs are entitled to rectification of the contracts. This depends not on intention but on proof that the written contract is not the contract into which the parties entered, and the terms of the contract into which they had entered must be clearly proved.

In *Crane* v. *Hegeman-Harris Co. Inc.*[1] Simonds J. said[2]: "I would rather, I think, say that the court can only act if it "is satisfied beyond all reasonable doubt that the instrument "does not represent their common intention, and is further "satisfied as to what their common intention was. For let it be "clear that it is not sufficient to show that the written instrument

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[19] [1939] 1 All E.R. 662, 664.

[20] (1886) 33 Ch.D. 22.

[1] [1939] 1 All E.R. 662.

[2] Ibid. 665.

"does not represent their common intention unless positively "also one can show what their common intention was. It is in "the light of those principles that I must examine the facts of "this somewhat complicated case." When that case was before the Court of Appeal Sir Wilfred Greene M.R. spoke of the "high "degree of conviction which unquestionably is to be insisted "upon in rectification cases."[3]

I accept without hesitation the finding of Pilcher J. that both Hampson and Brooks were under a mistaken view as to what "feveroles" or beans described in Egypt as "feveroles" were, and that that mistake came about as the result of what Brooks said. Still, it is necessary to ascertain what the contract was. The offer clearly was Tunisian horsebeans. It was so treated by the plaintiffs in their cable to Rose (Middle East), who accepted it the same day. On acceptance by the plaintiffs a slip was made out in the defendants' office, and that formed the groundwork of the contract. The oral contract between the plaintiffs and the defendants was in fact for 500 tons of Tunisian horsebeans, and the written contract was in the same terms. In those circumstances, a claim to rectify the written contract by adding the word "feveroles" cannot succeed. The written contract is in the same terms as the oral contract. Whatever remedies the plaintiffs might have, or might have had, rectification is not one of them.

Mr. Roche, on behalf of the defendant sellers, submitted that either there was a contract for horsebeans, or there was no contract at all. That seems to me to be right. I cannot accept the submission of Mr. Diplock that, because of the conversation some days before November 2 to the effect that "feveroles" meant "horsebeans," the oral contract was a contract for the sale of "feveroles." We know that the defendants passed on to the plaintiffs an offer for the sale of horsebeans. If it had been sought to introduce the word "feveroles" into the contract, it is almost certain that inquiries would have been made in North Africa, and some information might have been forthcoming as to the varieties of horsebeans, in which event Hampson and Brooks might not have agreed on terms, or they might have agreed on terms other than those at which they arrived.

The same considerations apply to the second contract as to the first. I do not regard this as a case in which rectification can be granted. I am in favour of allowing the appeal.

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[3] [1939] 4 All E.R. 68, 71.

DENNING L.J. stated the facts and continued:—It is quite plain that neither the Egyptian buyer nor the plaintiffs could claim damages under the written contracts, because those contracts were contracts for horsebeans, and the goods delivered were in fact horsebeans; and that has been so found by arbitrators in London. In those circumstances the plaintiffs seek in this action to have their contract with the defendants rectified so as to make it refer to "feveroles" instead of horsebeans. If they get the contract rectified they will claim damages for failure to deliver "feveroles." Their object in so doing is, of course, to cover themselves against a claim by their Egyptian buyers. We were told that the courts in Egypt have, on a similar parcel of 200 tons, already held the plaintiffs liable for not supplying "feveroles." Hence the desire of the plaintiffs to be able to claim over against the defendants.

The facts which I have stated raise nice questions on the law of mistake. It is quite clear on the evidence that the parties to the second and third contracts (though not to the first) were under a common mistake. The defendants, the plaintiffs, and the Port Said firm of buyers all thought that "feveroles" meant horsebeans, and that horsebeans meant "feveroles." They thought that if they got horsebeans they would get the "feveroles" which they wanted. It was under the influence of that mistake that they entered into those contracts for horsebeans. The defendants were, of course, the cause of all the trouble. Thinking that "feveroles" just meant horsebeans, they asked their Algerian supplier to supply horsebeans, and he did so. They ought to have asked him to supply "feveroles," and then there would have been no trouble. The Algerian supplier no doubt knew the difference between horsebeans ("feves") and "feveroles." If he had been asked for "feveroles," he would have quoted for "feveroles" and supplied "feveroles"; but being asked only for horsebeans, he supplied horsebeans.

What is the effect in law of this common mistake on the contract between the plaintiffs and defendants? Mr. Roche quoted *Bell* v. *Lever Brothers Ld.*,[4] and suggested that the contract was a nullity and void from the beginning, though he shuddered at the thought of the consequences of so holding. I am clearly of opinion that the contract was not a nullity. It is true that both parties were under a mistake, and that the mistake was of a fundamental character with regard to the subject-matter.

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[4] [1932] A.C. 161.

The goods contracted for—horsebeans—were essentially different from what they were believed to be—"feveroles." Nevertheless, the parties to all outward appearances were agreed. They had agreed with quite sufficient certainty on a contract for the sale of goods by description, namely, horsebeans. Once they had done that, nothing in their minds could make the contract a nullity from the beginning, though it might, to be sure, be a ground in some circumstances for setting the contract aside in equity. In *Ryder* v. *Woodley*,[5] where a buyer contracted to buy a commodity described "St. Gilles Marais wheat," believing that it was wheat when it was not, the contract was held to be binding on him and not a nullity. In *Harrison & Jones Ld.* v. *Bunten & Lancaster Ld.*,[6] where parties contracted for the supply of "Calcutta kapok 'Sree' brand," both believing it to be pure kapok containing no cotton, whereas it in fact contained 10 to 12 per cent. of cotton, Pilcher J. held that their mistake, although fundamental, did not make the contract a nullity. In *McRae* v. *Commonwealth Disposals Commission*,[7] where sellers contracted to sell a stranded oil tanker, described as lying at a specified point off Samarai, believing that there was a tanker at such a place when there was in fact no such tanker there, nor anywhere in the locality, the High Court of Australia held that the mistake, although fundamental, did not make the contract a nullity, and that the buyers were entitled to damages. The court showed convincingly that *Couturier* v. *Hastie*[8] was a case of construction only. It was not a case where the contract was void for mistake. The other old cases at common law can likewise be explained. At the present day, since the fusion of law and equity, the position appears to be that when the parties to a contract are to all outward appearances in full and certain agreement, neither of them can set up his own mistake, or the mistake of both of them, so as to make the contract a nullity from the beginning. Even a common mistake as to the subject-matter does not make it a nullity. Once the contract is outwardly complete, the contract is good unless and until it is set aside for failure of some condition on which the existence of the contract depends, or for fraud, or on some equitable ground: see *Solle* v. *Butcher*.[9] Could this contract, then, have been set aside? I think it could, if the parties had acted in time. This contract was made under a common mistake as to the meaning of "feveroles" and "horsebeans." This mistake was induced by the innocent misrepresentation of the defendants made to the buyers and passed on to the sub-buyers. As soon as the buyers and sub-buyers discovered the mistake, they could, I think, have rejected the goods and asked for their money back. The fact that the contract was executed would not be a bar to rescission. But once the buyers and sub-buyers accepted the goods, and treated themselves as the owners of them, they could no longer claim rescission: see *Leaf* v. *International Galleries.*[10]

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[5] (1862) 10 W.R. 294.

[6] [1953] 1 Q.B. 646; [1953] 2 W.L.R. 840; [1953] 1 All E.R. 903.

[7] (1951) 84 C.L.R. 377.

[8] (1856) 5 H.L.C. 673.

[9] [1950] 1 K.B. 671, 691; 66 T.L.R. (Pt. 1) 448; [1949] 2 All E.R. 1107.

The buyers now, after accepting the goods, seek to rectify the contract. Instead of it being a contract for "horsebeans" simpliciter, they seek to make it a contract for "horsebeans "described in Egypt as feveroles" or, in short, a contract for "feveroles." The judge has granted their request. He has found that there was "a mutual and fundamental mistake" and that the defendants and the plaintiffs, through their respective market clerks, "intended to deal in horsebeans of the feverole "type"; and he has held that, because that was their intention —their "continuing common intention"—the court could rectify their contract to give effect to it. In this I think he was wrong. Rectification is concerned with contracts and documents, not with intentions. In order to get rectification it is necessary to show that the parties were in complete agreement on the terms of their contract, but by an error wrote them down wrongly; and in this regard, in order to ascertain the terms of their contract, you do not look into the inner minds of the parties—into their intentions—any more than you do in the formation of any other contract. You look at their outward acts, that is, at what they said or wrote to one another in coming to their agreement, and then compare it with the document which they have signed. If you can predicate with certainty what their contract was, and that it is, by a common mistake, wrongly expressed in the document, then you rectify the document; but nothing less will suffice. It is not necessary that all the formalities of the contract should have been executed so as to make it enforceable at law (see *Shipley Urban District Council* v. *Bradford Corporation* [11]); but, formalities apart, there must have been a concluded contract. There is a passage in *Crane* v. *Hegeman-Harris Co. Inc.*[12] which suggests that a continuing common intention alone

[10] [1950] 2 K.B. 86; 66 T.L.R. (Pt. 1) 1031; [1950] 1 All E.R. 693.

[11] [1936] Ch. 375.

[12] [1939] 1 All E.R. 662, 664.

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will suffice; but I am clearly of opinion that a continuing common intention is not sufficient unless it has found expression in outward agreement. There could be no certainty at all in business transactions if a party who had entered into a firm contract could afterwards turn round and claim to have it rectified on the ground that the parties intended something different. He is allowed to prove, if he can, that they *agreed something different*: see *Lovell & Christmas* v. *Wall*, *per* Lord Cozens-Hardy M.R., and *per* Buckley L.J.,[13] but not that they *intended* something different.

The present case is a good illustration of the distinction. The parties no doubt intended that the goods should satisfy the inquiry of the Egyptian buyers, namely, "horsebeans described "in Egypt as feveroles." They assumed that they would do so, but they made no contract to that effect. Their agreement, as outwardly expressed, both orally and in writing, was for "horse-"beans." That is all that the defendants ever committed themselves to supply, and all they should be bound to. There was, no doubt, an erroneous assumption underlying the contract —an assumption for which it might have been set aside on the ground of misrepresentation or mistake—but that is very different from an erroneous expression of the contract, such as to give rise to rectification.

The matter can best be tested by asking what would have been the position if the contract between the defendants and the plaintiffs had been for "feveroles." Surely, then, the defendants on their side would have stipulated with their Algerian suppliers for the delivery of "feveroles," and the plaintiffs on their side would have agreed with their sub-buyers to deliver "feveroles." It would not be fair to rectify one of the contracts without rectifying all three, which is obviously impossible.

There is one other matter I must mention. In the statement of claim the plaintiffs originally claimed damages for breach of a collateral warranty—a warranty that the horsebeans would be a compliance with a demand for "feveroles"—but that claim was formally abandoned at the trial. I do not myself quite see why it was abandoned. Section 4 of the Sale of Goods Act, 1893, was no bar to it. Nor was such a warranty in any way in contradiction of the written contract. (*Smith* v. *Jeffryes*[14] was not an action on a collateral warranty.) The only difficulty in such a claim might be whether there was a contractual warranty or merely an innocent misrepresentation. I should myself have thought that it had a better chance of success than the claim for rectification. It was put forward by the plaintiffs very forcibly in their letter of March 12, 1951, but its abandonment at the trial makes it impossible for us to consider it. We have only to consider the question of rectification; and on that I think that the plaintiffs fail. I agree that the appeal should be allowed and judgment entered for the defendants.

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[13] 104 L.T. 85, 88, 93.

[14] 15 M. & W. 561.

MORRIS L.J. Both plaintiffs and defendants are merchants engaged in the grain trade and dealing on the Baltic Exchange, and there can be no doubt that the plaintiffs, as buyers, would appreciate that the defendants did business for forward shipment. The plaintiffs would appreciate that the defendants bought and sold simultaneously and would buy from a shipper in order to sell to the plaintiffs. The defendants knew that the plaintiffs were buying in order to resell. These circumstances do not, however, govern the determination of the issue of rectification now raised between the parties.

It seems to me clear beyond doubt that both parties proceeded on the basis that " feveroles " and " horsebeans " were the same. The plaintiffs' representative expressed the matter succinctly when he said: " I had agreed to buy because feveroles were " horsebeans and horsebeans were feveroles." In that belief the parties came to agreement, and the formal written contracts were prepared and signed. The parties had throughout a clear common intention and purpose of buying and selling horsebeans, and their written agreements faithfully embodied and exactly recorded what they had agreed. In these circumstances it seems to me that no claim for rectification can succeed.

Both parties thought that the result of what they clearly understood and clearly expressed would be that the plaintiffs as buyers would be able to satisfy the inquiry which, as the defendants knew, had been received. In that they were mistaken as a result of the advice honestly given by the defendants' market clerk. But the fact that they were under a mistaken impression as to what their agreement would achieve does not disturb the clarity and the fixity of the agreement which they in fact made. The defendants intended to offer horsebeans and the plaintiffs intended to accept horsebeans: the written agreements correctly reflected and incorporated what they had agreed.

The judge said that " both the plaintiffs and the defendants " made an oral agreement in which they intended to deal in

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"horsebeans of the feverole type." With respect, that was not quite the position. There was no question of contracting in reference to a "type" of horsebeans. There was a joint understanding that they should contract in reference to "horsebeans" simpliciter which they thought were the same as "feveroles." If, as now appears to be the case, they were wrong, it appears probable that they would not have acted as they did had they been enlightened. But this does not enable one party to convert the contract into something different from what it was.

On the assumption that "feveroles" are different from "horsebeans," it cannot be said that the parties agreed on the sale of a commodity of the separate existence of which they had no knowledge. The defendants were selling "horsebeans," and in order to sell they would have to acquire "horsebeans." If "feveroles" are different, then the defendants, and equally the plaintiffs, never even gave their minds at all to the question of a sale of some products which are different from "horsebeans."

Appeal allowed.
Leave to appeal to the House of Lords refused.

Solicitors: *Richards, Butler & Co.; Thomas Cooper & Co.*

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Singleton, Denning and Morris L.JJ.

DICKSON *v.* FLACK.

[1951 No. D. 300.]

Factory—Dangerous machinery—Woodworking machine—Guard against contact with cutters—No guard against parts flying out of machine—Duty of occupier to guard against both dangers—Woodworking Machinery Regulations, 1922 (*S.R. & O.* 1922, *No.* 1196), *reg.* 17—*Factories Act*, 1937 (1 *Edw.* 8 & 1 *Geo.* 6, *c.* 67), *s.* 14 (1).

By the Woodworking Machinery Regulations, 1922–1945, reg. 17: "The cutter of every vertical spindle moulding machine shall when "practicable be provided with the most efficient guard having "regard to the nature of the work which is being performed."

The Factories Act, 1937, s. 14, provides: "(1) Every dangerous "part of any machinery . . . shall be securely fenced . . ."

The plaintiff was testing a vertical spindle moulding machine when one of the cutters flew off and he was struck in the eye and injured by a flying bolt or nut. The Shaw guard fitted to the machine provided some protection against an operator coming into contact with the cutters, but was not effective to protect him against the known danger of pieces flying out of the machine, which revolved with great centrifugal force at a very high speed.

In an action by the plaintiff against his employers for damages, inter alia, for breach of statutory duty under regulation 17 or under section 14 (1) of the Factories Act, 1937, Havers J. held that the regulations modified the absolute obligation to fence imposed by section 14 (1), that the obligation under regulation 17 was to guard only against the danger of contact with the cutters, and that the defendants had fulfilled that obligation and were therefore not liable to the plaintiff. On appeal by the plaintiff:—

Held, *per* Singleton and Morris L.JJ., that the duty under regulation 17 was not limited to providing the most efficient guard against the danger from the cutters, but extended to require guarding against the known danger of pieces flying out of the machine; and that the defendants' failure so to guard was in breach of the regulation.

Per Denning L.J. Regulation 17 was confined to the requirement of providing a guard for the cutter, and did not deal with the danger of parts flying out, that being a danger inherent in the machine itself and not dependent on the nature of the work which was being performed.

Per Singleton and Denning L.JJ., following *Benn* v. *Kamm & Co. Ld.* [1952] 2 Q.B. 127; [1952] 1 T.L.R. 873; [1952] 1 All E.R. 833, that since regulation 17 did not specify the type of guard to be used, it did not define exhaustively the duty of the occupiers, and the general duty to fence securely under section 14 (1) of the Act of 1937 remained applicable; and that the defendants were in breach of that duty since the guard provided left a gap above the cutters which was a dangerous part of the machine which had to be securely fenced.

Carroll v. *Andrew Barclay & Sons Ld.* [1948] A.C. 477; 64 T.L.R. 384; [1948] 2 All E.R. 386 distinguished.

Harrison v. *Metropolitan Plywood Co.* [1946] K.B. 255; 62 T.L.R. 109; [1946] 1 All E.R. 243 approved.

Decision of Havers J. [1953] 1 W.L.R. 196; [1953] 1 All E.R. 236 reversed.

APPEAL from Havers J.[1]

The plaintiff, James Dickson, aged 67, an experienced woodworking machinist, was employed by the defendants in their joiners' shop, and was in charge of several woodworking machines. On March 26, 1950, he was testing a vertical spindle moulding machine to see that the cutters were working properly and the machine running evenly, preparatory to putting pieces of wood through the cutters. The machine was an old one, but mechanically in fair condition. It was powered by electricity, with press button controls which conformed to the regulations. It had a spindle head-piece unit which received and carried an interchangeable square cutter block, revolving with the spindle unit at 4,500 revolutions a minute. Two cutters were attached to the cutter block by bolts and nuts, and as the cutter block revolved the cutters, which moulded the wood, revolved with it. If the nuts were not properly tightened, or were defective, there was a possibility of a bolt or bolts being loosened, and there sometimes occurred " drift " and a cutter might become loose.

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[1] [1953] 1 W.L.R. 196; [1953] 1 All E.R. 236.

The plaintiff, who worked in front of a table, put two cutters on the cutter block and tightened them with a spanner. He then fitted on to the machine a spring guard, known as a Shaw guard, which covered the aperture on the machine on the operator's side and had the advantage of exerting pressure on the wood passing along the cutters from above and from the front, thus guarding the hand and fingers of the operator from contact with the cutters.

The time taken in testing was normally very short. The machine was just reaching its maximum speed, and the plaintiff was standing about 2 ft. 6 ins. away from it, when a bolt securing one of the cutters broke, the cutter came off the machine, and a portion of a bolt or nut flew out and struck him in the eye, as a result of which he lost the eye.

The plaintiff brought an action against the defendant employers claiming (1) that they were in breach of their duty under regulation 17 of the Woodworking Machinery Regulations, 1922–1945,[2] to provide " the most efficient guard having regard to the nature " of the work which is being performed "; (2) further or alternatively, that they were in breach of their duty under section 14 (1) of the Factories Act, 1937,[3] to fence every dangerous part of a machine securely; and (3) that they were negligent in failing to take reasonable care to see that their employees were not subjected to unnecessary risk. The defendants denied the breaches of duty and negligence.

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[2] Woodworking Machinery Regulations, reg. 17: " The cutter of every " vertical spindle moulding machine " shall when practicable be provided " with the most efficient guard having " regard to the nature of the work " which is being performed."

Reg. 18: " For such work as cannot " be performed with an efficient guard " for the cutter, the wood being " moulded at a vertical spindle moulding machine, shall, if practicable, be " held in a jig or holder of such construction as to reduce as far as " possible the risk of accident to the " worker."

[3] Factories Act, 1937, s. 14 (1): " Every dangerous part of any " machinery . . . shall be securely " fenced unless it is in such a position " or of such construction as to be as " safe to every person employed or " working on the premises as it would " be if securely fenced: Provided " that, in so far as the safety of a " dangerous part of any machinery " cannot by reason of the nature of " the operation be secured by means " of a fixed guard, the requirements " of this subsection shall be deemed " to have been complied with if a " device is provided which automatically prevents the operator from " coming into contact with that part."

During the six-day hearing before Havers J. evidence was given by expert witnesses which showed that the danger of some part being thrown from such a machine moving at such a high speed had been recognized for many years by those in the trade and those responsible for safety precautions in woodworking shops.

In particular, two pamphlets were before the court. The first, published by the Home Office in 1928 (" Safety Pamphlet " No. 8. Fencing and Other Safety Precautions for Woodworking " Machinery ") (at p. 51) warned that " the vertical spindle " moulder or shaping machine is one of the most dangerous tools " in common use. It causes a large number of accidents yearly." It emphasized the danger from contact with the cutters, and continued: " The fatal accidents are caused by cutters breaking " off or coming loose, and being hurled away with great velocity, " due to the centrifugal force developed by their exceptionally " high speed . . ." and concluded: " It is therefore of prime " importance that suitable safeguards should be chosen for each " operation and that cutters should be set with scrupulous care." The second pamphlet, first published in 1935 and reprinted for the Factory Department of the Ministry of Labour and National Service in 1947 (" Safety Hints on the Use of Woodworking " Machinery "—Form No. 279, H.M. Stationery Office) while stressing the danger from flying cutters, gave diagrams of guards which could be used for this type of work and (at p. 14) stated: " The danger to workers at neighbouring machines or benches can " be minimized by the provision of guards and screens which will " intercept a flying cutter."

Though some of the witnesses admitted no knowledge of these pamphlets, their views as to the different types of guard which might be used were extensively canvassed, and some of them said that the guard provided (the Shaw guard) gave protection against the danger of contact with the cutters, though not against the possibility of parts being ejected from the machine.

In his judgment Havers J. considered the different types of guard suggested, including the cage guard and the Shaw guard used; he did not consider anything in the nature of a combination of the two. He found that for all ordinary straight work, after testing, the Shaw guard provided was the most efficient guard to protect fingers and hands against the primary danger envisaged

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by regulation 17, namely, contact with the cutters. On the basis of the House of Lords decision in *Carroll* v. *Andrew Barclay & Sons Ld.*,[4] he held, contrary to the decision of Hilbery J. in *Harrison* v. *Metropolitan Plywood Co.*,[5] that the obligation under regulation 17 did not require the defendants to provide a guard against the second known danger of pieces of the machine being flung out; and he gave judgment for the defendants, assessing the damages provisionally at £2,660 13s. 0d.

In the Court of Appeal, the claim based on negligence at common law was raised, but not pursued, in view of the findings of fact by Havers J.

F. W. Beney Q.C. and *F. Donald McIntyre* for the plaintiff. The plaintiff's claim for breach of statutory duty is based on regulation 17 of the Woodworking Machinery Regulations, 1922, and section 14 of the Factories Act, 1937. Havers J. accepted, with qualifications, the submission that testing the machine is part of the process of " work being performed." The issue under regulation 17 is whether the duty is to provide " the most efficient " guard " against two known dangers—(a) contact with the cutting parts of the machine, and (b) pieces of the machine flying out. Hilbery J. considered this regulation in *Harrison* v. *Metropolitan Plywood Co.*[6] and decided, in a case where the cutter came loose and broke, that the guard must be one which would protect against something flying out. Havers J. took the view that that decision was wrong in the light of the later House of Lords decisions in *Nicholls* v. *F. Austin (Leyton) Ld.*[7] and *Carroll* v. *Andrew Barclay & Sons Ld.*[8] *Nicholls'* case,[9] in which the House decided that section 14 of the Factories Act did not require fencing against pieces of wood coming out of a circular saw, does not really assist here. In *Carroll's* case,[10] where on different facts the House considered the duty under section 13, which deals with transmission machinery, it was held that that section did not in ordinary cases require the erection of an enclosure to prevent broken machinery from flying out; but Lord du Parcq[11] specifically left open the question which has arisen here, namely, that if there are machines whose parts may be expected to get loose and fly out, the duty even under section 14 (for he was not considering these regulations) might be to fence; and Lord Jowitt L.C. also desired to leave that question open.[12] *Harrison* v. *Metropolitan Plywood Co.*[13] was cited to their Lordships, and none of them said that it was wrongly decided, but only that they got no help from it because the Woodworking Machinery Regulations were a separate code made under section 60 of the Factories Act, differently worded and dealing with different dangers. It is submitted that Havers J., in deciding on the basis of the House of Lords decisions cited that *Harrison's* case [13] was wrong, was himself in error, for there is no justification for looking at section 13 of the Act and then qualifying the words of the regulation by reference to that section, where the words are quite different.

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[4] [1948] A.C. 477; 64 T.L.R. 384; [1948] 2 All E.R. 386.

[5] [1946] K.B. 255; 62 T.L.R. 109; [1946] 1 All E.R. 243.

[6] Ibid.

[7] [1946] A.C. 493; 62 T.L.R. 320; [1946] 2 All E.R. 92.

[8] [1948] A.C. 477; 64 T.L.R. 384; [1948] 2 All E.R. 386.

[9] [1946] A.C. 493.

[10] [1948] A.C. 477.

[11] Ibid. 486–7.

In *Miller* v. *William Boothman & Sons Ld.*[14] the Court of Appeal held that regulation 10 of these regulations, which provides for a specific type of fencing for a circular saw, took the place of section 14 of the Factories Act. That case is distinguishable from the present, for regulation 17, which requires only "the most efficient guard having regard to the nature of the work "which is being performed," leaves it open to the occupier to ascertain what is the most efficient guard, and does not exclude the applicability of section 14 of the Act. In ascertaining what is the most efficient type of guard, some help may be obtained from the safety pamphlets published by the Home Office and the Ministry of Labour, which not only emphasize the very danger here being considered, namely, the danger from flying cutters or parts of cutters, but also show the type of guard which could be used—and, significantly, the type of Shaw guard used by the defendants does not figure in the pamphlets. It is also submitted that what was said in *Carroll's* case [15] is consistent with *Hindle* v. *Birtwhistle*.[16]

[SINGLETON L.J. I have always thought that Wills J.'s definition of dangerous machinery in that case has never been bettered [17]; and both he and Wright J.[18] were prepared to treat a guard as a protection against something which might fly out. Transmission machinery, dealt with by section 13, may be safe because of its height or position, but where one has this particular vertical spindle machine, with enormous centrifugal force, made up of bits which might fly out, it is rather different.]

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[12] [1948] A.C. 477, 482.

[13] [1946] K.B. 255.

[14] [1944] K.B. 337; 60 T.L.R. 218; [1944] 1 All E.R. 333.

[15] [1948] A.C. 477.

[16] [1897] 1 Q.B. 192; 13 T.L.R. 129.

[17] [1897] 1 Q.B. 192, 195.

[18] Ibid. 196.

Beney Q.C. Yes; particularly when it is clear that the danger was well known to those concerned with the trade. On the language of regulation 17 there are two risks to be guarded against, and the "most efficient guard" must give protection against both dangers.

With regard to the plaintiff's claim under section 14, *Benn* v. *Kamm & Co.*[19] decided that where a regulation did not define exhaustively the duty of the occupier of a factory to fence certain machines, the defendants were in breach of section 14 of the Act requiring them to fence every dangerous part of any machinery: see *per* Denning L.J.[20] The doctrine of *Miller* v. *William Boothman & Sons Ld.*[21] only applies where all the dangers are covered by the regulations. If regulation 17 may be construed as applying only to one of the two dangers, then the Factories Act is left unaffected, and section 14 will apply to dangers other than those specifically covered by the regulations. In the remainder of the woodworking regulations specific types of guard are mentioned. In regulation 17 it must be one related to the particular risks of the work being performed at any particular time. For testing, at least, a cage type of guard was necessary, and it may even be that two types of guard would be required to satisfy the duty under the regulation and under the Act.

H. B. Hylton-Foster Q.C. and *Martin Jukes* for the defendants. By those who practise in the trade the Shaw guard has been universally accepted under these regulations for many years. The proposition that there should be two guards is quite unreasonable, and has no regard to the qualifying words in regulation 17: "when practicable." In construing these regulations no material guidance is obtained from the fencing sections of the Factories Act, 1937. The only way to discover the standard for measuring the word "efficient" is by looking at the regulations themselves and the kind of machines contemplated. All these have in common the characteristic of cutting: see regulations 10 and 11; and in particular regulation 18: "such work as cannot be performed with an efficient guard *for the cutter*," which is slightly in the defendants' favour, as it rather indicates that regulation 17 was meant to require protection against cutters. It is much

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[19] [1952] 2 Q.B. 127; [1952] 1 T.L.R. 873; [1952] 1 All E.R. 833.

[20] [1952] 2 Q.B. 127, 132–3.

[21] [1944] K.B. 337.

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more difficult to say that the machines have in common the characteristic of an ability to eject bits in a dangerous fashion.

[SINGLETON L.J. The machines also have the element of sometimes moving at great speed, and the greater the speed, surely the greater the need for precautions?]

There is no authority on this point, for Hilbery J. in *Harrison's* case [22] did not have to consider the true construction of regulation 17; and it is submitted that the court ought to say that in whole these regulations are explicable on the basis that no danger is contemplated other than contact with the cutting edges.

[DENNING L.J. That may be dangerous for the defendants, for then, on the authority of *Benn* v. *Kamm & Co.*,[23] section 14 of the Act would apply.]

If the meaning of "the most efficient guard" in regulation 17 is ambiguous, the defendants ought to be given the most favourable construction if they are to be convicted of a penal offence, and the efficiency ought to be measured only in relation to the first danger, from the cutting edge.

McIntyre, in reply. It is not suggested that the statutory duty is to provide two separate guards, but only that this machine, which is admittedly dangerous, must be guarded either under section 14 or under the regulation, or at common law.

SINGLETON L.J., saying that the case was one of importance, stated the facts, and the grounds of the appeal, and continued: Mr. Beney suggested that there was a difference between testing time and working time, and that, even if it could be said that the Shaw type of guard was the best for ordinary working, it was not the best for use during testing time, and that there ought to have been another guard for testing. I do not think there is any substance in that distinction. Testing time is very short, and I propose to approach this case on the basis that if there was the most efficient guard provided for working purposes, that, too, should be regarded as sufficient for the short period during which testing would take place.

[His Lordship then described the machine, referred to the evidence, read passages from the official safety pamphlets, referred to the regulations, and continued:] Regulation 18 is also concerned with a guard for the cutter, and it may be said to give some support for the submission made on behalf of the defendants that the provision in regulation 17, as in regulation 18, is for a guard to the cutters, and thus something to prevent the hand or body of an employee coming into touch with the cutters.

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[22] [1946] K.B. 255.

[23] [1952] 2 Q.B. 127.

On the other hand, it is said on behalf of the plaintiff that when it is known that there is a risk of a part of machinery being flung out of the machine the most efficient guard must be designed with that risk or danger in mind as one of the things against which by virtue of regulation 17 protection must be given.

The regulations may be said to be additional, in one sense, to the provisions of section 14 of the Factories Act, 1937, but probably the better way to look at it is that they take the place of the provisions of the Factories Act to the extent to which they go.

That question was before this court in *Benn* v. *Kamm & Co. Ld.*,[1] where it was held that regulation 3 of the Horizontal Milling Machine Regulations, 1928, did not define exhaustively the duty of the occupier of the factory to fence horizontal machines; the defendants were in breach of section 14 of the Act of 1937, and the plaintiff was entitled to recover. Somervell L.J., having referred to *Miller* v. *William Boothman & Sons Ld.*,[2] said on this point[3]: "For these reasons, in my opinion, this appeal should "succeed. It must, in the first resort, be a question of the "construction of the regulations. If, on the face of them, they "exhaustively cover the subject matter, then there will be no "statutory liability."

It is submitted on behalf of the plaintiff in the present appeal that he is entitled to succeed on a breach of regulation 17 by the defendants, but that if perchance it can be said that regulation 17 does not go as far as it is submitted it does go, then the plaintiff is entitled to fall back on the provisions of section 14 (1) of the Act of 1937, and to say that there was here a dangerous part of machinery which was not fenced as it should have been, and that in the circumstances he is entitled to succeed under that section.

In *Harrison* v. *Metropolitan Plywood Co.*[4] before Hilbery J. a plaintiff, who was employed as a press operator at the defendants' woodworking factory, was at work at his machine when a piece of the cutter of a spindle moulding machine next to his broke away, flew out of its holder, and struck and injured him. The machine had a guard of the type usually provided for such machines, but it was proved that it would have been possible to provide a guard which would probably have prevented the injury to the plaintiff. It was held that the defendants' duty was to fence the machines in their factory in accordance with the Woodworking Machinery Regulations, 1922, and that they had failed to discharge that duty.

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[1] [1952] 2 Q.B. 127.
[2] [1944] K.B. 337.
[3] [1952] 2 Q.B. 127, 131–2.
[4] [1946] K.B. 255.

That decision was given on regulation 17, the self-same regulation with which we are here concerned, and Hilbery J.'s view was that there was an obligation created by the regulation to provide a guard against the risk, a known risk, of pieces of the machine flying out when the machine was revolving at great speed. It was not submitted that the regulation did not cover the risk of something flying out from the machine, and so, in one sense, the point which has been argued in the present case was not before the judge.

Two years later, in 1948, there came before the House of Lords an appeal in *Carroll* v. *Andrew Barclay & Sons Ld.*,[5] which fell to be decided under section 13 (1) of the Factories Act, 1937. That subsection provides: "Every part of the transmission "machinery shall be securely fenced." In that case a piece of belting, which was at a considerable height above working level, had broken, and caused injury to a workman as it fell. It was held that the obligation created by section 13 (1) did not extend to cover that risk, though the belt was part of the transmission machinery. The question whether in the case of a machine which might be expected to throw off loose or broken parts there was an obligation to fence for the purpose of protecting workmen against that danger was left open; at least in some of the opinions delivered. Lord Porter, considering sections 13 and 14, expressed the opinion that fencing meant [6] "the erection of a barricade to "prevent any employee from making contact with the machine, "not an enclosure to prevent broken machinery from flying out." Of course, the learned Lord was dealing with the Act itself and not with the regulation which is the matter for the consideration of this court; but Lord du Parcq, who agreed in the result in that case, said [7]: "I wish to add, however, that, while I agree with "Lord Normand that the words 'securely fenced' must be given "the same meaning in each of the three sections (sections 12, 13 "and 14), I think that they may well mean 'so fenced as to give "'security from such dangers as may be reasonably expected.' "If machines exist, or are hereafter invented and used, which "are dangerous because fragments or loose parts of the machinery "are sometimes ejected from them, then I am not prepared to "say that section 14 does not require such machines to be fenced

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[5] [1948] A.C. 477.

[6] Ibid. 486.

[7] Ibid. 486.

"for the purpose of protecting workmen against that danger. If "the dictum of my noble and learned friend Lord Simonds in "*Nicholls* v. *F. Austin (Leyton) Ld.*[8] is to be understood as "meaning that such a machine need not be fenced, I respectfully "doubt its accuracy, and must reserve my opinion upon it." Much the same was said by Lord Normand[9]: "It is possible, "therefore, that if a machine may be expected to throw off "detachable or broken parts in working, these parts may fall "to be treated as dangerous and subject to the requirements of "secure fencing. That is, however, a question on which I express "no opinion"; and Lord Jowitt L.C.,[10] while agreeing with the general opinion as to the result in that case, said: "At the same "time I should desire to leave open for further consideration the "question which Lord du Parcq raises in his opinion."

The House of Lords held that there was no liability on the facts of *Carroll's* case,[10a] but it must be remembered that that was a wholly different case from that which we have to consider. In the first place, there was no evidence of an accident such as took place in *Carroll's* case [10a] having happened before. It might have been said that under the wording of the different sections the position of the belt in that case was, to all intents and purposes, such that it was as secure as if it had been fenced, though it was not put in that way. In the present case it appears from pamphlet or booklet that serious accidents of the kind that happened here have happened before, and the evidence of the defendants' witnesses shows that there is a risk of parts of the machinery breaking away when there is movement at the high speed that takes place inside this particular machine. So the circumstances are different; and it may well be that if the facts of this case had to be considered under sections 12, 13 or 14, the House of Lords would still be prepared to say that there was liability if it was shown that the machine was dangerous because fragments of loose parts of the machinery were sometimes ejected from it.

In my view, the provisions of regulation 17 are wide enough to cover the risk of a cutter, or part of the cutter, or some part of the machine to which the cutter is attached, breaking away so as to cause danger to the men working the machine, or to other men working in that part of the factory. I am prepared to follow the judgment of Hilbery J. in *Harrison* v. *Metropolitan*

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[8] [1946] A.C. 493, 505.

[9] [1948] A.C. 477, 490.

[10] Ibid. 482.

[10a] Ibid. 477.

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Plywood Co.[11] It seems to me that when a regulation of this type is made to prevent danger to workmen, and it is well known that there are two types of danger, the guard ought not to be confined so as to meet only one type of danger.

If it can be said that as both regulation 17 and regulation 18 mention only the cutter they extend only to prevent an employee making contact with the cutter, then that which Somervell L.J. said in *Benn* v. *Kamm & Co. Ld.*,[12] should be applied, and other parts of this machine fall to be regarded as dangerous parts of machinery within the meaning of section 14 (1), and they should thus be securely fenced, unless it is shown that they are in such a position, or of such a construction, as to be as safe to every person employed or working on the premises as they would be if securely fenced.

The evidence establishes beyond doubt that the revolving head-piece, the block and the cutter were dangerous parts of machinery. Unless the regulation covers all those parts section 14 comes into play, and it is for the court to determine whether or not, in view of the known danger, that which was said by Lord du Parcq applies in the circumstances of this case. I for myself would be prepared to hold that it does.

[His Lordship then analysed in detail the findings of Havers J. based on the evidence as to the type of guard which might have been provided, and continued:] Havers J. held that the Shaw guard was the most efficient for the work which was being done, and thus, even if he had been in favour of the plaintiff on the construction of the regulation, he said the plaintiff was not entitled to succeed, because he was not satisfied that the defendants had not provided the most efficient guard. If the judge had come to that conclusion after considering the different guards suggested in the pamphlets and the evidence, I should have found great difficulty in interfering with that which really is a question of fact for him; but it appears to me that he directed his attention only to the advantages of the Shaw guard as against a cage guard. [His Lordship then considered in detail the evidence as to the protection afforded by the various types of guard discussed by the witnesses and recommended in the official publications, and considered for himself the dangers to the operator and the limited protection afforded by the Shaw guard used, and continued:] Assuming that regulation 17 calls for a guard which would prevent pieces, or help to prevent pieces of any broken part, being thrown out it is necessary to consider that danger as well as the danger to the fingers, and one must ask one's self whether there is any difficulty about combining in one guard two forms of guard, or the placing in front, on the side, and behind the machine, a sheet of some kind. This workman was seriously hurt through a piece of the machine being ejected from it when it was travelling at high speed. It is the kind of risk that has been considered for many years. The books show that, and if the guard ought to be one which will meet that type of risk, as I think it ought to do, it is a sorry thing if, in the year 1950, no one could provide any sort of guard which would lessen that risk, and at the same time be a guard against hand injury. The publications to which I have referred show that there are guards which would do that, or which would help to minimize the risk, and unless something of that sort has been done I am not prepared to say that the most efficient guard was provided, having regard to the nature of the work which was being performed.

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[11] [1946] K.B. 255.

[12] [1952] 2 Q.B. 127.

[After considering the evidence of a witness for the plaintiff as to the advantages of a cage type of guard, his Lordship continued:] In that witness's view the cage guard was better for all purposes. There was no reason why the judge should accept that view against another view, but the result on the facts is that the finding of Havers J. means, if it stands, that in a case such as this, where there is a known risk of pieces being flung out of the machine, there is no obligation on the employers, the occupiers of the factory, to provide any guard above or round the machine to stop pieces being flung out. I cannot think that that is right. I am satisfied that on the materials which were before the court there were shown other types of guards to meet both dangers, and I do not think that it can be said that in the circumstances of this case, and having regard to the work which was being done (and in that I include the testing) the most efficient guard was provided.

Havers J., having reached the conclusion that the defendants were not at fault in that they had not, on his finding, committed any breach of regulation 17, went on to consider the law, and he appears to have thought that that which the House of Lords said in *Carroll's* case [13] weakened the decision of Hilbery J. some eight years ago under regulation 17. I do not think that that which was said in the House of Lords ought to be regarded as

[13] [1948] A.C. 477.

meaning that Hilbery J.'s decision was wrong; indeed, it would appear that in the like circumstances certainly Lord du Parcq would have taken a view of section 13 of the Act similar to that which Hilbery J. took of regulation 17. *Harrison* v. *Metropolitan Plywood Co.*[14] was cited in argument in the House of Lords and was referred to in some of their Lordships' opinions. No one said it was wrong. I do not think that it was.

I would say that if it be shown that the defendants had not provided the most efficient guard, they were in breach of regulation 17, and the accident which was sustained by the plaintiff arose through that breach. If it can be said that regulation 17 does not go so far, I would be prepared to hold that there was a breach of section 14 with the like result, though I prefer to base my judgment on regulation 17. In my opinion this appeal should be allowed, and judgment should be entered for the plaintiff for the amount of damages provisionally assessed by the judge.

DENNING L.J. There are two dangers from a vertical spindle moulding machine; one is the danger of a man's hand in the course of his work coming into contact with the cutters; the other is the danger of a cutter flying out.

It seems to me that regulation 17 only deals with the first danger; the danger of a man's fingers at work coming into contact with the cutters. The evidence shows that there are a number of guards available to deal with that particular danger, and that the efficiency of those guards varies according to the nature of the work. A guard is necessary for curved work different from that used for straight work, and even with straight work a different guard may be necessary for small pieces of wood from that which is necessary for large pieces of wood. Accordingly, regulation 17 requires that the most efficient guard should be provided, "having regard to the nature of the work." Regulation 17 is in terms confined to a guard for the "cutter," and regulation 18 shows that the guard in mind is a guard for the man's hands in holding the work.

I do not find that regulation 17 deals with the second danger, the danger of a cutter flying out. That danger does not depend on the nature of the work, but the nature of the machine itself. It is inherent in it that the cutter may work loose and fly out whatever the kind of wood that is being used; curved, straight small or large. Inasmuch as that danger is not dealt with by regulation 17, in my judgment it comes within section 14 of the Act itself.

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[14] [1946] K.B. 255.

This court quite recently, in *Benn* v. *Kamm & Co. Ld.*,[15] held that the fact that a regulation requires a guard for one dangerous part in particular of a machine does not mean that there is no obligation in regard to other dangerous parts. In regard to other dangerous parts not covered by the regulation, you must go back to the Act itself. So here. The dangerous part provided for by regulation 17 is the part of the table where the man's hand is likely to come into contact with the cutters while he is doing his work. The regulation does not provide for the gap in the machine above the cutter where it may fly out and thus cause danger. That is another dangerous part. It falls within section 14, and must be securely fenced.

But, it is said, the decision of the House of Lords in *Carroll's* case,[16] binds us to hold that the Factories Act does not protect workmen from pieces which fly out of machines. That case does not warrant any such proposition. The decision there turned on the fact that the belt was in such a position as to be as safe as it would be if it was securely fenced. That is one of the exceptions in the Act. It has no place in the case before us. The House of Lords distinctly kept open the case of a machine which "may be expected to throw off detachable or broken parts in "working." Lord Normand said that[17] "these parts may fall "to be treated as dangerous and subject to the requirements of "secure fencing." This, in my opinion, is such a case. I am of opinion that any part which may be expected to throw off a loose part is itself a dangerous part and ought to be securely fenced under section 14.

If, however, this view is wrong, that is to say, if regulation 17 is comprehensive and is intended to deal with both the dangers, then it should be construed as requiring that a guard should be provided to protect the men from both dangers. The guard which was provided in this case only protected them from one of the dangers, that of the man's hand coming into contact with the cutter; it did not protect them from the other danger, the danger of a cutter flying out. I fail to see how a guard can be "the "most efficient guard" when it does not make any attempt to deal with what is a palpable danger. If necessary there must be a combined guard or two guards.

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[15] [1952] 2 Q.B. 127.

[16] [1948] A.C. 477.

[17] Ibid. 490.

It is said that our decision will involve a change in the practice hitherto adopted in the trade. That does not affect me in the least. A flying cutter is a serious danger, and it is recognized as such in all the official publications. Those who for their own profit employ men on dangerous machines ought to devise some safeguard to protect the men from danger, and if our decision today encourages them to do so it will have done some good. I agree that the appeal should be allowed and judgment entered for the plaintiff.

MORRIS L.J. I agree. I add a few words because we are taking a different view from that reached by the judge, and because of the importance of the case.

On the construction of regulation 17 of the Woodworking Machinery Regulations, 1922, the judge concluded[18]: "In considering, therefore, what is the most efficient guard I have to "decide what is the most efficient guard for the purpose of "preventing any employee from making contact with the cutters "having regard to the nature of the work which is being "performed."

That view is not in accord with the view which was the basis of the decision of Hilbery J. in *Harrison's* case,[19] but it is said that in *Harrison's* case[19] Hilbery J. did not have debated before him the points which were raised by Mr. Martin Jukes before the judge in the present case; and it is further said that, in the light of the later decision of the House of Lords, Hilbery J. would not have reached the conclusion that he reached.

Hilbery J. said in *Harrison's* case[20]: "No doubt the primary "consideration, where woodworking machinery is concerned, is "the protection of the worker at the machine. The very fact "that he works at the machine exposes him to particular risks. "One would, therefore, expect, as the fact is, that the regulations "would everywhere provide for securing as high a degree of safety "for him as practicable. But it does not necessarily follow that "the regulations must, therefore, be construed as only for the "protection of the workers at the machines, and not for the "benefit and protection of other workers in the factory as well." Hilbery J. was there proceeding on the basis that a fortiori if the man at the particular machine had been hit by a piece of a flying cutter he would have been able to recover. I do not read the speeches in the House of Lords in *Carroll* v. *Andrew Barclay & Sons Ld.*[21] as negativing the correctness of Hilbery J.'s decision, and as Singleton L.J. has pointed out, although the case is referred to in some of the speeches in the House of Lords, doubt is not cast on it. In *Carroll* v. *Andrew Barclay & Sons Ld.*[21] it was held that the requirement in section 13 (1) of the Factories Act that every part of transmission machinery shall be securely fenced imposed on occupiers of factories a duty to erect a barricade to prevent any employee from making contact with the machinery, but did not in ordinary cases oblige them to erect an enclosure to prevent broken machinery from flying out and injuring him. But when considering that case and the light which it throws on the construction of regulation 17 of the Woodworking Machinery Regulations it is important to bear in mind that included in the words of section 13 (1) of the Act are the words " . . . unless it " is in such a position or of such construction as to be as safe to " every person employed or working on the premises as it would " be if securely fenced "; and it seems to me that that consideration had weighed with their Lordships in reaching their decision. Lord Porter, for example, said[22]: " For my own part, I find it " difficult to envisage any set of circumstances in which unfenced " machinery would be safe, owing to its position or indeed con" struction if the risk of breakage is to be taken into consideration."

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[18] [1953] 1 W.L.R. 196, 206–7.

[19] [1946] K.B. 255.

[20] Ibid. 259.

In regulation 17 there are no words comparable to those found in section 13, and also found in sections 12 and 14 of the Act. I do not read regulation 17 as being limited. It provides that the cutter shall, when practicable, be provided with " the most " efficient guard having regard to the nature of the work which " is being performed." The proof is overwhelming that among the varieties of danger that relate to cutters are those involved if anyone comes in contact with the cutter, and also the dangers which are involved in working near a cutter which may, owing to the centrifugal force of the vertical spindle moulding machine, become detached on occasion and hurt someone working at the machine or at a neighbouring machine. The pamphlet issued by the Ministry of Labour (at p. 13) says: " From time to time " accidents occur as a result of cutters flying; such accidents are " generally severe and are sometimes fatal "; in this connexion it is relevant to have in mind that there has now been in the Law Reports for some years the decision of Hilbery J. where a flying cutter did hurt to someone at a neighbouring machine.

[21] [1948] A.C. 477.

[22] Ibid. 484.

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Morris L.J.

I therefore consider that regulation 17 is not to be read in a limited way, and that it has to be considered here whether there was the most efficient guard for this cutter, and in considering that question it is relevant to have in mind one answer given by one witness who, when asked by Mr. McIntyre whether the Shaw type of guard would prevent part of the cutter from being ejected from the machine, replied " No."

It was said that the Shaw guard was in position, and that the fact that that guard was in position would provide some protection against a flying cutter, nut or bolt. The answer made by Mr. McIntyre to that submission seems to me very powerful, namely, that such a submission is small comfort to the plaintiff who was at this machine when it had a Shaw guard on, and who has the best reason in the world for knowing that the Shaw guard did not prevent a flying nut or part of a bolt from striking him. The question, therefore, in my view, is whether there was in this case the most efficient guard. We have not the precise facts which were before Hilbery J. in *Harrison's* case, but the report says [23]: " It was proved that there was a known form of cage guard which " would have fenced the major part of the circumference of a " circle round the vertical spindle with a wire-mesh screen, and " that the work in hand could have been performed with that " guard in position. Such a guard is in fact the subject of an " illustration in the Safety Pamphlet No. 8 issued by the Home " Office."

It seems to me that there was no real protection here in regard to the upper part of the machine, and no real or valid protection provided, or attempted to be provided, against the risk of a flying cutter or a flying nut, and I am in agreement with the way in which the facts of this matter have been dealt with by Singleton L.J. I concur, therefore, in the view that this appeal should be allowed.

Appeal allowed.
Judgment for the plaintiff for £2,660 13*s*.

Solicitors: *W. Timothy Donovan; Tiddeman, Coules & Co.*

M. M. H.

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[23] [1946] K.B. 255, 259.

1953
June 4, 5,
17, 19.

Lord Goddard C.J.

TERRELL *v.* SECRETARY OF STATE FOR THE COLONIES AND ANOTHER.

Colony — Judge — Tenure of office — Straits Settlements — Judge of Supreme Court—Normal retiring age 62—Judge required to retire before attaining 62 — Application of Act of Settlement, 1700 — Whether contract by Crown to employ judge until age of 62—Right of Crown to dismiss at pleasure—Act of Settlement (1700) (12 & 13 *Will.* 3, *c.* 2), *s.* 3—*Straits Settlements Act*, 1866 (29 & 30 *Vict. c.* 115), *ss.* 2, 3.

In 1930, the claimant, then in his 49th year, was offered an appointment as a puisne judge of the Supreme Court in Malaya. By a letter written on behalf of the Secretary of State the claimant was informed that the qualifying term for a pension was seven years and that the compulsory retiring age in the case of a judge was 62, and the claimant accepted the appointment on those terms. In 1942, while the claimant was on leave in Australia, Malaya was occupied by the enemy and the Letters Patent appointing the claimant, of which there was no copy, and those relating to other judges, were lost or destroyed. On April 7, 1942, the claimant was informed that the Secretary of State could not justify retaining him now that his post was necessarily in abeyance and that there was no alternative but to award him a pension on abolition of office, and the claimant's appointment, accordingly, ended on July 7, 1942, 17 months before his 62nd birthday.

On the question whether the claimant was liable in law to be required to retire before reaching the age of 62, it was contended that the principle of judicial independence embodied in the Act of Settlement, 1700, was to be regarded as part of the law of the Straits Settlements, and that therefore the claimant held office during good behaviour and could not be removed; alternatively, that if he had been appointed during pleasure, the correspondence between the claimant and the Secretary of State constituted a contract, enforceable against the Crown, that the Crown would employ him until he attained the age of 62:—

Held, (1) that the provisions of section 3 of the Act of Settlement relating to the tenure of office of judges of the Supreme Court in England did not apply to the Straits Settlements or to any other colony; it was for the Crown by exercise of the prerogative or Parliament by statute to set up courts in acquired territory, and the conditions under which judges of those courts held office depended upon the terms on which the Crown or Parliament established them.

(2) That it was clear from a consideration of the Straits Settlements Act, 1866, Royal Letters Patent of 1911, which instructed the governor that he might appoint judges to hold office during His Majesty's pleasure, and Royal Warrants relating to the courts in the Straits Settlements that judges held office during the Royal pleasure; accordingly, the claimant having been appointed by Letters Patent issued pursuant to a Royal Warrant which followed

the terms of the Letters Patent of 1911, held office during the Royal pleasure.

Mackay v. *Lord Advocate*, 1937 S.C. 860 considered.

(3) That it was a rule of law that once it was established that the Crown had the right to dismiss at pleasure, that right could not be taken away by any contractual arrangement made by an executive officer or department of State; a judge appointed during pleasure was in no different position from the point of view of dismissal from that of any other person in the service of the Crown; having been appointed to hold office during pleasure no correspondence which took place before or after the claimant's appointment could affect the terms of appointment; accordingly, the termination of the appointment by the Crown was justifiable in law.

Dunn v. *The Queen* [1896] 1 Q.B. 116; 12 T.L.R. 101 and *Willis* v. *Gipps* (1846) 5 Moo.P.C. 379 considered.

Once a doctrine has become a rule of law the court is bound to apply it without inquiring into its origin.

Pillans v. *Van Mierop* (1765) 3 Burr. 1663 and *Rann* v. *Hughes* (1778) 7 Term Rep. 350n.; 4 Bro.Parl.Cas. 27 considered.

SPECIAL CASE STATED by an arbitrator, Mr. Neville Gray Q.C.

The following statement of the material facts found by the arbitrator is taken from the judgment of Lord Goddard C.J.: The claimant, a member of the English Bar, had practised as an advocate and solicitor in the Straits Settlements for several years, and in 1930 he, then being in his 49th year, was offered by the Secretary of State the appointment as a puisne judge of the Supreme Court of Malaya, which is the name now usually applied to the Straits Settlements. One of the terms of the offer was that the claimant, after retirement, would not resume his practice anywhere in Malaya.

At the same time he was sent a copy of the rules as to leave and pension. Having perused them, he wrote to the Under Secretary of State on July 20, 1930, pointing out that, as the rules provided for a minimum of 10 years' service as a qualification for pension and for compulsory retirement at 55, they would not apply to him. On August 7 the Under Secretary of State informed him that he had been selected for appointment and stated: "Your "special position in regard to pension is governed by regulation 13 "(1) of the regulations under the Pensions Ordinance, 1928, a "copy of which are enclosed for perusal and return. The com-"pulsory retiring age in the case of a judge is 62."

While under the Pensions Ordinance an officer in the service of the Government of Malaya, including a judge, could be required to resign at the age of 55, the Secretary of State had directed in 1928 that judges should not be required to retire till the age of

62, or in exceptional cases, subject to the approval of the Secretary of State, at 65. Regulation 13 (1) of the regulations fixed seven years as the period of service qualifying a judge for a pension.

The claimant then accepted the proffered judgeship and subsequently was promoted to be a judge of appeal. Nothing turned on the fact of his promotion as it was agreed that there was no difference between the tenure of a judge of first instance and that of a judge of appeal.

Early in 1942 Malaya was overrun and occupied by the enemy, and at that time the claimant was on leave in Australia. The Letters Patent appointing the claimant as judge were lost or destroyed during the invasion, as were all those belonging to other judges, and no copy of the actual document was available.

On March 10, 1942, he was informed that the Secretary of State regretted that he could find no suitable post in the colonial legal service for him to occupy between the expiration of his leave and the date on which he would reach normal retiring age, which would not be until December, 1943. He was invited to ask for permission to retire and was told that the retirement would become effective at the expiration of three months after notice of acceptance. The claimant felt unable to comply with that suggestion and asked that he might remain on half-pay until a suitable appointment became available. On April 7 he was informed by letter that as the Secretary of State did not know of any suitable legal appointment he could not justify retaining the claimant on half-salary as his post was necessarily in abeyance; he regretted, therefore, that he had no alternative but to award the claimant a pension on abolition of office, adding that his retirement would take effect and pension commence on the expiration of his earned leave or three months after the date of the letter, whichever was the later. In the result, his appointment ended on July 7, 1942, exactly 17 months before his 62nd birthday.

The claimant disputed the validity of his retirement, and the question whether he was liable in law to be required to retire from the position which he held as judge of appeal before reaching the age of 62 was referred to an arbitrator.

Before the arbitrator it was contended on behalf of the claimant that under the law in force in the Straits Settlements and Malaya his appointment could not lawfully be terminated before he attained the age of 62 except for sufficient cause; that the letters of July 20, 1930, and August 7, 1930, constituted contractual conditions to which his appointment was subject and under which he could not be called upon to retire under the age of 62; and that, by the letter of August 7, 1930, the Crown was estopped from alleging a power to dismiss him before the age of 62.

On behalf of the Crown it was contended that under the law of the Straits Settlements all judges held office during the Royal pleasure; that in any case such judges were by statute subject to compulsory retirement at the age of 55; that the letters did not constitute a contract, but that if they had constituted a contract such a contract would have been ultra vires the Secretary of State, and that any contract would have been frustrated by the course of events in Malaya; that the letter of August 7, 1930, did not amount to a representation that the claimant would not be subject to compulsory retirement until the age of 62, but only to a statement that he would not be allowed to continue in his office after attaining 62, and that any representation was not of an existing state of facts but related to the future, nor was it a promise that the Crown would not enforce its legal rights and that, if it did amount to such a promise it was not enforceable.

Subject to the opinion of the court the arbitrator found that judges in the Straits Settlements held office during the Royal pleasure, that such judges were in any case subject by statute to compulsory retirement at the age of 55; that the letters did not constitute an enforceable contractual obligation and that, even if they had constituted such an obligation the claimant was not thereby exempted from his liability to compulsory retirement at the age of 55; and that, if his finding that judges in the Straits Settlements held office during the Royal pleasure was right, the Crown was not prevented by the representations from dismissing the claimant before he had attained the age of 62; but that, if that finding was wrong, then the Crown was in equity prevented from asserting that the claimant was in law liable to be dismissed before attaining the age of 62. The arbitrator awarded that the claimant was liable in law to be required to retire from his office before reaching the age of 62.

During the hearing the draft of a Royal Warrant relating to the claimant's appointment was put in. The draft, dated December 4, 1930, from the court of St. James, was of a warrant for an appointment under the Sign Manual directed to the Governor of the colony authorizing and requiring him to cause letters patent to be issued under the seal of the colony appointing the claimant to be a puisne judge of the Supreme Court of the Straits Settlements: "to have hold exercise and enjoy that said "office and place during our pleasure, together with all the rights, "profits, privileges, and advantages thereunto belonging and "appointing. . . ."

Sir Frank Soskice Q.C., *Edward Terrell* and *K. J. T. Elphinstone* for the claimant. The claimant's retirement was not justified in law. The letter of April 7, 1942, required his retirement on the ground of abolition of office; although his office was, by force of circumstances, in abeyance in 1942, it could not be abolished except by a legislative act. It was not competent for the Secretary of State to say that there was no longer the office of a judge of appeal in the Supreme Court of Malaya. The claimant held office during good behaviour and could not be dismissed. Settlers in a new colony take with them that body of English law appropriate to the colony, but as the colony develops additional increments of English law flow in from time to time as appropriate and become embodied in the law of the colony: *Cooper* v. *Stuart*[1] and *Yeap Cheah Neo* v. *Ong Cheng Neo.*[2]

The earliest courts in the Straits Settlements were set up under Royal Charters of 1807, 1826 and 1855. The judges of those courts were the Governor, the resident councillor and a recorder. By the Straits Settlements Act, 1866,[3] the colony ceased to be part of India and the Sovereign was given power to constitute courts and officers. By Ordinance No. 3 of 1867 the Governor ceased to be a judge and the recorder of Singapore became known as Chief Justice and the resident councillors as Lieutenant-Governors. It is true that the recorders held office at pleasure, but it is submitted that those courts were administered by the executive and were not true courts, and that the judges were executive and not judicial officers. Ordinance No. 5 of 1868[4] abolished the earlier courts and set up for the first time a Supreme

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[1] (1889) 14 App.Cas. 286; 5 T.L.R. 387.

[2] (1875) L.R. 6 P.C. 381.

[3] Straits Settlements Act, 1866, s. 2: "It shall be lawful for Her "Majesty, by Order or Orders to be ". . . made, with the advice of her ". . . Privy Council . . . to constitute "such courts and officers, and to make "such provisions and regulations for "the proceedings in such courts, and "for the administration of justice . . . "as may be deemed advisable . . . any "law, statute, or usage to the con-"trary in anywise notwithstanding."

[4] Ordinance No. 5 of 1868: "1. "The Court of Judicature of Prince "of Wales' Island, Singapore and "Malacca . . . is hereby abolished. "2. There shall be . . . for the colony "of the Straits Settlements . . . a "court of justice, which shall be "called 'The Supreme Court of the "'Straits Settlements,' and . . . shall "be a court of record. . . . 6. . . . "The future judges of the court shall "be appointed by Her Majesty . . . "by Letters Patent under the Public "Seal of the Colony, to be issued in "pursuance of . . . warrants . . . "granted by Her Majesty . . . under "Her . . . Sign Manual and Signet."

Court in the fullest sense; nothing was said in that Ordinance, or in any subsequent Ordinances, as to the tenure of office of judges in the Supreme Court, and it is submitted that at that date the provisions of section 3 of the Act of Settlement, whereby judges of the Supreme Court hold office quamdiu se bene gesserint, became part of the law of the colony, and that from that time onwards the judges of the Supreme Court could only be removed by an address of both Houses of the Imperial Parliament. *Cooper* v. *Stuart*[5] is relied on, and see also the *Lauderdale Peerage*,[6] in particular the judgment of Lord Blackburn.[7]

The statutory provisions were carried into effect by Letters Patent. The Royal Letters Patent of February, 1911, still in force, provides by article 14 that "the Governor may . . . "constitute and appoint all such judges . . . as may be lawfully "constituted or appointed by us, all of whom, unless otherwise "provided by law, shall hold their offices during our pleasure." At the time of the claimant's appointment the Ordinance in force was the consolidating Ordinance No. 101 (Courts) of 1926.[8] That contained a similar proviso to article 14 of the Letters Patent, but it is submitted that, in the case of a Supreme Court judge, the provision for tenure of office "during our pleasure" does not apply because by reason of the incorporation of the Act of Settlement into the law of the Straits Settlements, it was "other-"wise provided by law." In 1868, when the previous courts were abolished and the Supreme Court was set up, English law flowed in.

[LORD GODDARD C.J. It is one thing to say that the common law flowed in and another thing to say that statute law did.]

The tenure of our judges quamdiu se bene gesserint is fundamental to our constitution; as nothing was said about it in the legislation setting up the Supreme Court in 1868 that part of our constitution flowed in then, on the principles of *Cooper* v. *Stuart*.[9]

[LORD GODDARD C.J. It would be curious if judges in Malaya could only be removed by resolution of the Imperial Parliament. There must be some provision whereby those judges could be removed.]

There is no provision to be found in the laws of the colony.

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[5] 14 App.Cas. 286.

[6] (1885) 10 App.Cas. 692.

[7] Ibid. 744.

[8] Ordinance No. 101 (Courts), 1926; (Revised Laws, 1936, No. 10), s. 4: "(1) The judges of the Supreme Court "shall be appointed by His Majesty "by Letters Patent under the Public "Seal of the Colony to be issued in "pursuance of any warrant or war-"rants to be granted by His Majesty "under His Sign Manual and Signet."

[9] 14 App.Cas. 286.

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Terrell v. Secretary of State for the Colonies.

[Burke's Act [10] was referred to.] The rule that civil servants and executive officers can be dismissed by the Crown at any time and cannot sue the Crown is based on public policy: *Dunn* v. *The Queen.*[11] In the case of a judge public policy demands the opposite; it is one of the principles of our constitution that judges should be independent. [Reference was made to *Denning* v. *Secretary of State for India in Council.*[12]]

[Lord Goddard C.J. If it is a rule of law, is the court entitled to inquire into its origin? Is it not the duty of the court to administer it independently of how it arose?]

The origin of the rule must be looked at in order to ascertain its application and extent. A judge is, from the nature of his office, in a very different position from that of a civil servant. The right of the Crown to dismiss at pleasure can be excluded where there is an express undertaking to employ for a certain time: see *Reilly* v. *The King*,[13] where the matter was left open, and *Robertson* v. *Minister of Pensions*,[14] referred to by Lord Simonds in *Howell* v. *Falmouth Boat Construction Co. Ld.*[15] *Lucas* v. *Lucas* [16] and *Rodwell* v. *Thomas* [17] are not really decisions to the contrary. The correspondence which took place before the claimant's acceptance of his appointment attached to it the contractual term that he would not be called upon to retire before reaching the age of 62. That is the clear meaning of the words used, and they constituted a contract which the claimant could enforce against the Crown under section 1 of the Crown Proceedings Act, 1947. In *Shenton* v. *Smith* [18] it is clearly implied that a special contract alters the general position. [Reference was also made to *Rederiaktiebolaget Amphitrite* v. *Rex.*[19]]

[Lord Goddard C.J. The effect of that argument depends upon the terms of the claimant's appointment.]

The warrant instructing the Governor to appoint the claimant a judge is not of much assistance. It was an executive and not a legislative act, and its validity must be tested by examining the power under which it was made. The appointment was made by the Crown under section 4 of the Ordinance of 1926, and not under article 14 of the Letters Patent of 1911. Article 14 contemplates an appointment initiated by the Governor, but a puisne judge is appointed on the instructions and authority of the Crown. If the Act of Settlement applied to judges in Malaya an authorization containing the limitation " at pleasure " was to that extent ultra vires.

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[10] The Colonial Leave of Absence Act, 1782 (22 Geo. 3, c. 75).

[11] [1896] 1 Q.B. 116; 12 T.L.R. 101.

[12] (1920) 37 T.L.R. 138.

[13] [1934] A.C. 176; 50 T.L.R. 212.

[14] [1949] 1 K.B. 227; 64 T.L.R. 526; [1948] 2 All E.R. 767.

[15] [1951] A.C. 837; [1951] 2 T.L.R. 151; [1951] 2 All E.R. 278.

[16] [1943] P. 68; 59 T.L.R. 281; [1943] 2 All E.R. 110.

[17] [1944] 1 K.B. 596; 60 T.L.R. 431; [1944] 1 All E.R. 700.

[18] [1895] A.C. 229.

[19] [1921] 3 K.B. 500.

If the claimant's appointment was contractual, the Pensions Ordinance, 1928,[20] could only apply to him with the approval of the Secretary of State; his appointment could not be terminated by the Governor but only by the same power as that which appointed him.

Sir Lionel Heald Q.C., A.-G., and *J. P. Ashworth* for the Crown. The courts of the colony were established under the prerogative of the Crown and there must, therefore, be a power in the Crown to dismiss the judges. The independence of judges is far from being a general principle or fundamental to their office; it is most exceptional for judges to have security of tenure and judges of the English Supreme Court are in a remarkable position in that respect. But for the provisions of the Act of Settlement judges in this country today would hold office at the pleasure of the Crown, and unless a specific provision can be found providing that judges overseas hold office during good behaviour, such as the provision in section 99 of the British North America Act, 1867, and in paragraph 72 of the Commonwealth of Australia Constitution, 1900, it must be presumed that they hold at pleasure. The Act of Settlement cannot be incorporated into the legislation of a colony or possession by implication. If that Act were incorporated, overseas judges could only be removed by both Houses of Parliament here. It is the general rule that colonial judges, even the Chief Justices, hold office at pleasure. In *Montague* v. *Lieutenant-Governor of Van Dieman's Land*[21] and *Willis* v. *Gipps*,[22] decisions under Burke's Act, it was agreed that the judges held office at pleasure.

In approaching this case one must look to see whether there is any provision giving to the judges in the Straits Settlements an exceptional position. All the Letters Patent relating to the appointment of judges in the colony were lost or destroyed, and it must therefore be presumed that the claimant was validly appointed in accordance with the terms of the statute. Article 14 of the Letters Patent of 1911 provided that the Governor, acting in the name of and on behalf of the Crown, should issue Letters Patent in the colony appointing judges. The only way, therefore, in which the Crown could validly appoint was by instructing the Governor by Royal Warrant to issue Letters Patent. The question therefore becomes one of the construction of article 14. By that article judges are to hold at pleasure " unless otherwise provided " by law "; the words " unless otherwise provided by law " cannot themselves incorporate the Act of Settlement, and the statutes and Ordinances concerning the Straits Settlements, and, earlier, the East India Company, contain no provision that the principle of section 3 of the Act of Settlement is to apply. What indications there are, e.g., article 15 of the Letters Patent, which gives the Governor the right to dismiss in certain cases, are to the contrary effect. Further, the compulsory contribution fund is inconsistent with the Act of Settlement, and there are other such indications in the Pensions Ordinance.

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[20] Pensions Ordinance, 1928 (Revised Laws, 1936, c. 78), s. 2: "In "this Ordinance . . . 'officer' includes "a judge of the Supreme Court. . . ."
S. 11 (1): "It shall be lawful for "the Governor . . . subject as regards "officers appointed under instructions "received from or through the Secre"tary of State to the approval of the "Secretary of State, to require any "officer to retire. . . ."

[21] (1849) 6 Moo.P.C. 489.

[22] (1846) 5 Moo.P.C. 379.

Assuming that judges in the colony hold office during pleasure, they do not hold office by virtue of a contract; in relation to salary the terms may be contractual—see *Reilly* v. *The King*[23]—but a right to sue for payment does not affect the position, and in relation to tenure of office there is not a contract but an appointment. There is no reason why colonial judges should form an exception to the general principle of law that all servants of the Crown hold during pleasure. In the case of a colonial judge that general principle may well be consistent with public policy. [*Dunn* v. *The Queen*[24] was referred to.] In *Mackay* v. *Lord Advocate*[25] Lord Robertson observed that any judicial officer prima facie held office during good behaviour under the terms of the Declaration of the Convention Parliament, 1689, unless statute provided to the contrary; it is submitted that that is not the law of England and that that case is not an authority for importing tenure during good behaviour into all judicial appointments. *Gould* v. *Stuart*[26] is in point in the present case. In *Reilly* v. *The King*[27] the question of the Crown's right to dismiss was not relevant to the decision.

The natural meaning of the letters of July 20 and August 7, 1930, read together, is that the age at which the claimant must retire would be 65; not that he would be retained until he reached that age. Even if the letters did mean that he would be retained until he reached the age of 65, a letter written by a Secretary of State cannot alter or take away the Crown's right to dismiss at pleasure. A contract not to dismiss the claimant under the age of 65 would have been ultra vires and unenforceable: *Rodwell* v. *Thomas* [28] and *Denning* v. *Secretary of State for India in Council.*[29]

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[23] [1934] A.C. 176.
[24] [1896] 1 Q.B. 116.
[25] 1937 S.C. 860.
[26] [1896] A.C. 575.
[27] [1934] A.C. 176.

The arbitrator was wrong in finding that the letters amounted to a representation; if there were a representation, it was not as to an existing fact but as to the future. Technically, it may be right to say that the claimant's office was not abolished in 1942, but it was not then possible for him to act as a judge; if there was a contract providing for the exercise of judicial duties by him it became impossible of further performance, and if there was such a contract it was subject to the ordinary law of frustration.

Sir Frank Soskice Q.C., in reply. *Mackay* v. *Lord Advocate* [30] is in the claimant's favour. The office of a judge is obviously not one which should be held at the dictate of some civil servant. There is nothing to stop the Crown binding itself by a contract in the same manner as an ordinary citizen. The authorities show that it is only in certain cases that the rule that the Crown cannot bind itself not to dismiss at pleasure applies. That rule arose because of the requirements of public policy, and if the test is public policy it cannot apply to a judge. If the claimant's appointment was during pleasure there was nothing to stop the Crown from saying that it was the Crown's pleasure that he would not be retired before the age of 62. The claimant accepted the appointment and gave up his practice, relying on a representation that he would not be retired before reaching the age of 62; on ordinary principles that raises an equitable estoppel which binds the Crown. [Reference was made to *Central London Property Trust Ld.* v. *Hightrees House Ld.*,[31] *Combe* v. *Combe*,[32] *Foakes* v. *Beer* [33] and *Attorney-General to H.R.H. (Prince of Wales)* v. *Collom.*[34]]

Cur. adv. vult.

June 19. LORD GODDARD C.J. stated the facts as set out above and continued: Some point was made by Sir Frank Soskice on the wording of the letter of April 7, 1942, that it referred to the office being in abeyance and to the award of a pension on abolition of office, and he contended that the office had never been abolished. I do not stay to consider whether when an enemy invades a country and occupies it effectively, if in the result only temporarily, this abolishes offices held by officials and judges, for the object and effect of the letter are clear enough. As the claimant had declined to ask for leave to retire, his appointment was determined. The claimant, in the question he submitted to arbitration, put it that he was required to retire, and however his service was ended the question is whether the termination was legally justifiable.

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[28] [1944] 1 K.B. 596.

[29] 37 T.L.R. 138.

[30] 1937 S.C. 860.

[31] [1947] K.B. 130; 62 T.L.R. 557.

[32] [1951] 2 K.B. 215; [1951] 1 T.L.R. 811; [1951] 1 All E.R. 767.

[33] (1884) 9 App.Cas. 605.

[34] [1916] 2 K.B. 193; 32 T.L.R. 448.

Now the questions mainly argued before me were: (1) Does a judge in Malaya hold his office at the pleasure of the Crown or is he protected by the provisions of section 3 of the Act of Settlement of 1700 whereby judges hold their office during good behaviour and can only be removed by an address of both Houses of Parliament[1]? (2) If a judge is appointed during pleasure and not during good behaviour was there here a contract that the Crown would employ the claimant until he attained 62 and if so can he sue the Crown on that contract?

As to the first contention, Sir Frank Soskice submitted that the provisions of the Act of Settlement relating to the tenure of a judge were so fundamental in the law of this country that they would form part of the law of a new colony when it was first settled. The doctrines relating to the application of English law to territories acquired by the Crown are to be found in Blackstone's Commentaries, vol. 1, [107], and his statement of the law was approved in *Cooper* v. *Stuart*.[2] The mode of acquisition may vitally affect the application, or at least the extent of the application, of English law to the acquired territory. If at the time of annexation by cession or conquest there exists there a system of law, that will be the law of the country until it is altered by legislation. But there may exist a system of law adapted to the requirements of a native population but unsuitable for English settlers, in which case the settlers will carry the English law with them, at least so far as is necessary to the conditions of the new colony as in the case of the settlement of unoccupied territory: see *Freeman* v. *Fairlie*,[3] a case relating to India. This seems to have been the position with regard to the Straits Settlements, which were first colonized by the East India Company, and is I think recognized by the decision in *Yeap Cheah Neo* v. *Ong Cheng Neo*,[4] which approved a statement of the law on this point by Sir Benson Maxwell C.J.,[5] referred to in Braddell's Law of the Straits Settlements, 1931, 2nd ed., vol. 1, p. 62. But in my opinion it is quite impossible to say that the particular provision of the Act of Settlement relating to English judges of the superior courts automatically became the law of this or any other colony. A short answer is that while section 3 provided for judicial office being held during good behaviour, thus preventing the arbitrary removal of a judge, it also provided that he might be removed by an address of both Houses of Parliament. This appears to me to be wholly inapplicable to a colonial judge for I cannot believe that it would be right to hold that he could only be removed by an address of both Houses of the Imperial Parliament. It is for the Crown by exercise of the Prerogative, or Parliament by statute, to set up courts in acquired territory whether the acquisition be by cession, conquest or mere settlement, and the conditions under which judges of those courts are to hold their office must depend upon the terms on which the Crown or Parliament establish them.

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[1] See now Supreme Court of Judicature (Consolidation) Act, 1925, s. 12.

[2] 14 App.Cas. 286.

[3] (1828) 1 Moore's Indian App. 305.

Now in considering under what tenure the judges in Malaya hold office it is not, I think, necessary to go into a long history of the colony, for in 1866 the Straits Settlements Act was passed, providing among other things for the establishment of courts of law in the Straits Settlements. It is, however, by no means unimportant to see what the position was with regard to courts and judges in the colony before the Act was passed. A Charter of Justice known as the Third Charter had been granted by the Crown in August, 1855, and was ratified by section 4 of a statute passed in the same year; 18 & 19 Vict. c. 93. The court established thereunder was to consist of two divisions, one sitting at Singapore and Malacca, the other at Prince of Wales' Island, afterwards known as Penang. The judges were the governor, the resident councillor for the time being of the station in which the court sat and, as professional judges for each division, the recorders of Singapore and Penang. It was expressly provided in the Charter that the recorders should hold office during pleasure. A colonial governor always holds office during pleasure and the resident councillor was also a royal appointment, and the Charter provided that they should act as judges during their term of office. It is clear, therefore, that when the Act of 1866 was passed the judges held office during pleasure. Section 2 of that Act empowered Her Majesty by Order in Council, inter alia, to constitute such courts and officers as might be deemed advisable, any law, statute or usage to the contrary in any wise notwithstanding, thus in my opinion giving a complete and unfettered discretion to the Crown as to the terms on which judges and officers might be appointed. By the following section Her Majesty was given power to delegate her powers to three or more persons within the Settlements, and powers have been delegated by the Crown from time to time by Letters Patent to the Governor and Executive Council.

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[4] L.R. 6 P.C. 381.

[5] In *Choa Cheow Neoh* v. *Spottiswoode* (1869) W.O.C.App. 1; 1 Kyshe Reps. 216.

Consequent on this Act and the delegation, the Supreme Court of the Straits Settlements was established. Under Ordinance No. 3 of 1867 the recorder of Singapore became the chief justice of the Straits Settlements and the recorder of Penang became the first judge of Penang, and it was provided by section 6 of the Supreme Courts Ordinance, No. 5 of 1868, that future judges should be appointed by Her Majesty by Letters Patent under the public seal of the colony to be issued in pursuance of a warrant under the sign manual or signet. There is nothing whatever in the Ordinance to indicate that the tenure of these judges was changed and the only possible inference is that they as judges of the newly constituted court held office at pleasure as they had in the former court. It cannot be supposed that the tenure of future judges was intended to be in any way different from that by which the chief justice and the other senior judge, who were the original judges of the new court, held their offices. The Ordinance in force at the time of the claimant's appointment was the Ordinance No. 101 (Courts) of 1926, and section 4 (1) provided that judges of the Supreme Court should be appointed by His Majesty by Letters Patent under the public seal of the colony to be issued in pursuance of any warrant to be granted by His Majesty under his sign manual and signet, and this provision again appears in section 4 (1) of the consolidating Ordinance; the Courts Ordinance, 1936, c. 10.

The Royal Letters Patent of February, 1911, which are the instructions by the Crown to the governor, provide (as there is no doubt that earlier editions did, for, as I shall mention later, I have seen them) that by article 14 "the Governor may, in "our name and on our behalf, constitute and appoint all such

"Judges, Commissioners, Justices of the Peace, and other necessary Officers as may be lawfully constituted or appointed by "us, all of whom, unless otherwise provided by law, shall hold "their offices during our pleasure." It is not without importance to observe that when those Letters Patent of February, 1911, were sealed the material section of the Act of Settlement had long been repealed. It was repealed by the Statute Law Revision Act, 1881, as no longer necessary because a similar provision had been inserted in the Supreme Court of Judicature Act, 1873, which indisputably applied only to the supreme court of this country. So I can find no statutory provision that could apply to the judges of the Straits Settlements in 1911 making their offices tenable on conditions different from those which existed in 1868. The words "unless otherwise provided by law" are probably inserted ex abundanti cautela and in any case would safeguard the position if a subsequent legislative provision were made altering the tenure of office for the future.

At a late stage in the argument I was shown and asked by both parties to look at the Royal Warrant to the governor authorizing him to seal the Letters Patent appointing the claimant to his office. This is the warrant contemplated by section 4 (1) of the Ordinance of 1926. It carries the matter no further as it follows the terms of the Letters Patent to the governor and requires him to seal Letters Patent appointing the applicant to hold his office during His then Majesty's pleasure.

In my opinion it is clear that judges in the Straits Settlements, or Malaya to use the modern nomenclature, hold and always have held their office at the pleasure of the Crown. It does not appear to me that there is anything surprising in this. So accustomed are we in this country nowadays to the exceptional position occupied by the judges of the supreme court that we are apt perhaps to forget that their independence is comparatively modern in the long history of our law. Professor Maitland points out in his Constitutional History of England [6] that it was in the reign of Henry II that a body of professional judges first emerged to cope with the increasing work of the curia regis, and from them evolved the superior courts of common law. So from the middle of the 12th century to the very last year of the 17th the judges of the Royal Courts undoubtedly held their office at the pleasure of the Sovereign so far as any statutory provision was concerned, though according to Hallam (Constitutional History of England

[6] p. 69.

(1869), p. 736) the commissions of the judges in William III's reign were made "quamdiu se bene gesserint."

The great majority of judicial personages in this country do not enjoy the exceptional position of the judges of the Supreme Court. County court judges do not, though they do have a measure of protection by section 7 of the County Courts Act, 1934, nor do justices of the peace who deal with something like 90 per cent. of all criminal cases as well as with a multitude of civil matters. They have no security of tenure. Stipendiaries hold office during pleasure: see Stipendiary Magistrates Act, 1863, s. 3, and the Municipal Corporations Act, 1882, s. 161. So do the Metropolitan Police magistrates by the Metropolitan Police Act, 1829, s. 1. So it is not fundamental to the office of a judge that he should possess the immunity with which it was found necessary to clothe the judges of the supreme court by reason of what was considered the undue subservience of the judiciary in the time of the Stuarts towards the Sovereign and more particularly the attitude that they had taken up under fear of dismissal in upholding the exercise of the suspending power by James II. I recognize, of course, that the judicial personages to whom I have referred, with the exception of justices of the peace, are appointed under modern statutes and the legislature can impose any terms which seem to it appropriate. So, here, in my opinion the legislature has left it to the Crown to determine the tenure of the judges in Malaya and the Crown has determined it by the Letters Patent and the Royal Warrant. It is no reflection on the high standard and learning of the colonial judicial service to say that they hold office during pleasure. It may well be that when setting up courts in colonies, when in their infancy, and when communications were difficult and lengthy, the Crown desired to retain a fuller and more speedily exercisable control over the judges of those colonies than existed in this country.

Through the courtesy of the librarian of the India Office library I have been able to see the Letters Patent which set up the High Courts in India. The first of these were the Letters Patent of March 26, 1774, issued pursuant to 13 Geo. 3, c. 63,[7] establishing a Supreme Court at Fort William for the Province of Bengal. They provided for a chief justice and two puisne judges to be appointed during pleasure, and men of the quality and standing of Sir Elijah Impey, the first chief Justice of Bengal, and Sir Robert Chambers, the friend of Blackstone and his successor in the Vinerian Chair at Oxford, were content to accept office on those terms. Similar courts were established at Madras in December, 1800, and at Bombay in December, 1823, and the first court for Prince of Wales' Island, Singapore and Malacca was set up by Letters Patent of November, 1826, the previous court, for Prince of Wales' Island only, having been established in 1807. In the Letters Patent by which all these courts were established the same provision as to the tenure of the judges is found. That there has never been a demand to alter the terms of appointment of the judges in the colonial legal service may, indeed, be regarded as a tribute to the general judicial conduct and quality of those who fill these positions. I may add before leaving this part of the case that it seems clear that both the clause in the Letters Patent of February, 1911, to which I have referred and the Pensions Ordinance which provides that the governor may require the retirement of a judge at a certain age clearly proceed on the assumption that a judge in Malaya holds his office at pleasure, and it would seem strange indeed if not only the Secretary of State on whose advice the Letters Patent are issued, but also the legislative council which passed the Ordinances have all along been under a misapprehension as to the tenure whereby a judge of the colony holds his office. If a tenure equivalent to that conferred by the Act of Settlement were intended I should expect to find it stated clearly somewhere and not left to be implied by inference.

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[7] (1773).

Then it is submitted that even if the judges held office during pleasure the effect of the correspondence to which I have referred earlier in this judgment is to constitute a contract between the Crown and the claimant that he should be retained in office till he attained the age of 62. The present court is a creation of the Act of 1866 which by the section already quoted gave the Crown complete freedom as to the constitution of the courts and its officers. I have difficulty, therefore, in seeing how the Secretary of State, on whose behalf the letters were written, would have authority to bind the Crown even if he had purported to do so. So to do would appear to me clearly to constitute a clog on the Crown's right to dismiss at pleasure. I regard this right as a rule of law firmly established by the decisions (for instance, *Dunn* v. *The Queen*,[8] *Shenton* v. *Smith*[9] and *Rodwell* v. *Thomas*[10]), and once it is established that the

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[8] [1896] 1 Q.B. 116; 12 T.L.R. 101.

[9] [1895] A.C. 229.

[10] [1944] K.B. 596; 60 T.L.R. 431; [1944] 1 All E.R. 700.

Crown has power to dismiss at pleasure that right cannot be taken away by any contractual arrangement made by an executive officer or department of State.

Sir Frank Soskice argued that this doctrine was founded on public policy and referred to passages in the judgment of the Court of Appeal in *Dunn* v. *The Queen* [11] and contended that considerations which might apply to the appointment of civil servants or military officers could not apply to a judge. In my opinion, once a doctrine has become a rule of law, as I think this has, the court is bound to apply it without inquiring into its origin. It was by inquiring into the origin of the rule of law that consideration is necessary to support a simple contract that Lord Mansfield fell into error when he held, doubtless to the astonishment of the profession, in *Pillans* v. *Van Mierop*,[12] that an agreement evidenced by a document under hand only but without consideration could be supported. As Sir William Holdsworth and Sir Frederick Pollock have shown, historically Lord Mansfield's opinion was correct but it was too late in 1765 to question what had become a rule of law, and so the House of Lords held thirteen years later in *Rann* v. *Hughes*.[13] Moreover, I can see no good reason why a judge appointed during pleasure should be in any different position from this point of view from any other person in the service of the Crown. Kay L.J. in *Dunn* v. *The Queen* said [14]: "It seems to me that the continued employment "of a civil servant might in many cases be as detrimental to the "interests of the State as the continued employment of a "military officer. It is impossible not to see that in remote "places on the frontiers of our territory the question of peace "or war might depend on the action of a civil servant on the "spot; and it seems to me that there is as much ground for the "possession by the Crown of an unrestricted right of dismissal "in the case of civil service as there is in the case of military "service." That he uses the illustration of "the question of "peace or war" does not rule out other considerations, and were a colonial judge to exercise his office in a brutal, tyrannical or incompetent manner the consequences might be quite as, if not more, detrimental to the peace and good order of a colony as the action of a civil servant or military officer. I cannot find that this doctrine has been laid down in such terms as would exclude a judge, and indeed *Willis* v. *Gipps*[15] seems directly to apply it to judges. But as I have said, even if the Secretary of State purported to contract with the claimant he could not in my opinion limit the power of the Crown to dismiss at pleasure. He might have advised the withdrawal of the Letters Patent of February, 1911, and the issue of others giving the Governor directions to appoint judges during good behaviour, or he might have advised a Royal Warrant to be issued under section 4 (1) of the Ordinance of 1926, authorizing the Governor in a particular case to appoint not at pleasure, but during good behaviour, and then the appointment would be by the Crown, and I have no doubt that if His late Majesty had chosen to appoint a judge on those terms the appointment would have been perfectly valid. But having appointed the claimant to hold office during pleasure, in my opinion no correspondence which took place before or after the appointment could affect the terms of appointment.

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[11] [1896] 1 Q.B. 116.

[12] (1765) 3 Burr. 1663.

[13] (1778) 7 Term Rep. 350n.; 4 Bro.Parl.Cas. 27.

[14] [1896] 1 Q.B. 116, 120.

Apart from this, however, I agree with the arbitrator that a judge holds office by Royal appointment and not by contract. I think that the correspondence referred to does no more than inform the claimant of the general conditions applicable to the office. It tells him that at the age of 62 he will have to retire and might expect to receive a pension; it does not amount to an agreement that he is to be appointed for a definite period and not at the pleasure of the Crown.

Sir Frank Soskice placed great reliance on *Reilly* v. *The King*,[16] but I do not read that case as going anything like the length for which he contends. The actual point material to this case which the Judicial Committee decided was that if the terms of an appointment definitely prescribe a term and expressly provide for a power to determine "for cause" that excludes an implication that the appointment is at pleasure. The case also shows that there may be contractual rights existing before determination of a contract at will which are not inconsistent with a power to determine. Thus if a servant is engaged, whether by the Crown or an individual, at a salary but on the terms that he may be dismissed at will, if he is dismissed he may recover his salary for the time that he has served. Since that case I think it may very well be that if the Crown appoints to an office on the terms that it is to be held during good behaviour or that the holder is only to be removed "for cause"—which is really the same thing

[15] 5 Moo.P.C. 379.

[16] [1934] A.C. 176; 50 T.L.R. 212.

—he would be entitled formerly to present a Petition of Right and now to bring an action if he were removed without cause.

The claimant admitted in his reply that he was appointed under article 14 of the Letters Patent of 1911 to the Governor and sought to rely on that article. Sir Frank Soskice argued that that admission was made per incuriam, but even if it was it does not in my opinion alter the position. In strictness the claimant was appointed by Letters Patent issued pursuant to the Royal Warrant which follows the terms of article 14, and as I have already said, I regard the correspondence merely as telling him of the age of compulsory retirement and of the pension at whatever age he retired that he might expect. I say "expect" because under the Pensions Ordinance there is no absolute right to a pension.

Were I to accede to the argument that these letters amount to a contract I should be holding, in effect, that every person entering the service of the Crown who is told before he enters that his retiring age will be so and so could say that he had a contractual right to remain in the service till that age, and this would in effect override all the cases which have decided that a servant of the Crown holds office at pleasure, at least unless his appointment definitely prescribes a term or expressly provides for a power to determine only "for cause." That seems to have been exactly the argument put forward in *Shenton* v. *Smith*[17] and rejected by the Judicial Committee.

As I have already held that the claimant's appointment was at pleasure and there was no contract by the Crown, I do not find it necessary to deal with the questions of estoppel which were argued before me except to say that in my opinion no estoppel here arises, and in any case the claimant cannot use an estoppel even if it did arise as giving him a cause of action, for in effect he is plaintiff and though the matter is an arbitration he is really claiming a declaration that he was wrongly removed and has certain additional pension claims in consequence.

I ought, however, before parting with the case, to say a word with regard to a decision of Lord Robertson, Lord Ordinary, in *Mackay* v. *Lord Advocate*.[18] In that case by virtue of section 3 (4) of the Small Landholders (Scotland) Act, 1911, members of the Scottish Land Court held their appointments for life or until removed from office for inability or misbehaviour, and accordingly it was held that a clause in their appointments imposing the

[17] [1895] A.C. 229.

[18] 1937 S.C. 860.

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condition that they should vacate office at a particular age was ultra vires. That is a decision on the terms of a particular statute though the Lord Ordinary did express views with regard to the general nature of a judge's office and may have thought that provisions of the Declaration of the Convention Parliament of 1689, Chapter 13, which was a Scottish statute only, which altered the tenure of judges and made their offices tenable during good behaviour, applied generally to persons holding a judicial appointment. If he meant to go as far as this, I would respectfully say that in my opinion his conclusion was too wide, but in any case that decision is not binding on me and, as I have said, turns really upon the construction of the particular Act by which the pursuers were appointed.

I therefore uphold the award.

Judgment for the Crown.

Solicitors: *G. & G. Keith; Treasury Solicitor.*

J. F. L.

LITTLEWOOD *v.* GEORGE WIMPEY & CO. LD. AND BRITISH OVERSEAS AIRWAYS CORPORATION AND BRITISH OVERSEAS AIRWAYS CORPORATION (THIRD PARTY).

C. A.

1953
July 2, 3, 6, 27.

Singleton, Denning and Morris L.JJ.

[1951 L. No. 999.]

Limitation of Action—Negligence—Joint tortfeasors—Contribution—Action against one tortfeasor statute barred—Whether "liable"—Law Reform (Married Women and Tortfeasors) Act, 1935 (25 *&* 26 *Geo.* 5, *c.* 30), *s.* 6 (1) (*c*)*—Limitation Act,* 1939 (2 *&* 3 *Geo.* 6, *c.* 21), *ss.* 2, 21 (1) (2).

The Law Reform (Married Women and Tortfeasors) Act, 1935, s. 6 (1), provides: "Where damage is suffered by any person as a "result of a tort . . . (*c*) any tortfeasor liable in respect of that "damage may recover contribution from any other tortfeasor who "is, or would if sued have been, liable in respect of the same "damage. . . ."

A plaintiff, who was injured while working for a public authority, brought an action, more than twelve months after the date of the accident, for negligence against the first defendants, who were contractors on the site. The contractors thereupon served a third-party notice on the public authority, claiming contribution under section 6 (1) (*c*) of the Act of 1935 in the event of their being held

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liable to the plaintiff. Later the plaintiff joined the public authority as second defendants. The public authority pleaded as one of its defences both to the plaintiff's claim and to the third-party proceedings that they were protected by section 21 of the Limitation Act, 1939, in that the actions had not been commenced before the expiration of one year from the date on which the cause of action accrued, *i.e.*, the date of the tort.

Parker J. found that the public authority was one-third and the contractors two-thirds responsible for the damage suffered by the plaintiff. He gave judgment for the plaintiff against the contractors, but held that the plaintiff's action against the public authority failed because it was statute-barred under section 21. In the third-party proceedings, though holding that as the right to contribution arose only at the date when judgment was given for the plaintiff against the contractors and not at the date of the accident it would not have been statute-barred, he gave judgment for the public authority on the ground that, as they had been sued to judgment and held not liable to the plaintiff, albeit solely because of the protection afforded by section 21, they were not within the scope of tortfeasors contemplated by section 6 (1) (*c*) of the Act of 1935. On appeal by the contractors:—

Held (Denning L.J. dissenting), that the word "liable" in subsection (1) (*c*) meant "held liable" by judgment (or possibly by admission or on payment), and that as the public authority had been sued and held not liable, they did not fall within either category of tortfeasor covered by the words "who is, or would if "sued have been, liable"; and that the legislature's omission from the scope of the subsection of a class of tortfeasors who, though responsible for a tort, could be held not liable on some other ground, (*e.g.*, that the action was statute-barred), should not be cured by construing the subsection to include words which assumed a hypothetical action brought by a plaintiff "in time."

Per Denning L.J., dissenting. The word "liable" in subsection (1) (*c*) means "responsible in law," and the public authority, having been found one-third responsible, falls within the subsection and is liable. Alternatively, the words "if sued" envisage an action brought in time to be effective and not one which is statute-barred; and the public authority falls within those words because they would, if sued in time, have been held liable.

Per Singleton L.J. The right to contribution arises solely from the Act of 1935, the procedural machinery being provided by R.S.C., Ord. 16A, r. 3, which gives a defendant to third-party proceedings the right to raise any defence available to him, including section 21 of the Limitation Act, 1939.

Per Denning and Morris L.JJ. The reasoning of the court in *Tuckwood* v. *Rotherham Corporation* [1921] 1 K.B. 526 suggests that the one-year limitation imposed by section 21 of the Limitation Act, 1939, does not apply to the statutory right of action for contribution given by the Act of 1935 and that such an action may be brought, even against a public authority, at any time within the six-year period of limitation provided by section 2 of the Act of 1939.

View of Birkett J. in *Merlihan* v. *A. C. Pope Ld., Pagnello*

Third Party [1946] K.B. 166; 61 T.L.R. 508; [1945] 2 All E.R. 449 that the right of action for contribution arises at the date of the tort disapproved.

Morgan v. *Ashmore, Benson, Pease & Co. Ld. and Samuel Fox & Co. Ld.* [1953] 1 W.L.R. 418; [1953] 1 All E.R. 328 considered.

Decision of Parker J. [1953] 1 W.L.R. 426; [1953] 1 All E.R. 583 affirmed.

APPEAL from Parker J.

On July 28, 1949, John Littlewood, an employee of British Overseas Airways Corporation, was injured while at work by a lorry belonging to George Wimpey & Co. Ld. On April 26, 1951, he began proceedings against Wimpeys, claiming damages for their alleged negligence; and on June 20, 1951, Wimpeys by their defence denied negligence on their part and alleged negligence by the corporation, the plaintiff's employers. On July 6, 1951, Wimpeys served a third-party notice on the corporation, claiming contribution or indemnity under section 6 (1) (*c*) of the Law Reform (Married Women and Tortfeasors) Act, 1935.[1] On November 28, 1951, the corporation delivered their defence to the third-party proceedings.

On February 4, 1952, the plaintiff, having been advised that the corporation was not a public authority, obtained leave to amend, and amended his writ and statement of claim by adding the corporation as defendants in the action. The corporation, both in the defence to the third-party proceedings and to the plaintiff's statement of claim, pleaded section 21 of the Limitation Act, 1939,[2] as one of their defences, on the ground that at the time of the accident to the plaintiff, they as a public authority, were acting in intended execution of the Civil Aviation Act, 1946.

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[1] Law Reform (Married Women and Tortfeasors) Act, 1935, s. 6: "(1) "Where damage is suffered by any "person as a result of a tort (whether "a crime or not) . . . (*c*) any tortfeasor "liable in respect of that damage may "recover contribution from any other "tortfeasor who is, or would if sued "have been, liable in respect of the "same damage, whether as a joint "tortfeasor or otherwise, so, however, "that no person shall be entitled to "recover contribution under this sec-"tion from any person entitled to be "indemnified by him in respect of "the liability in respect of which the "contribution is sought."

[2] Limitation Act, 1939, s. 21: "(1) "No action shall be brought against "any person for any act done in pur-"suance, or execution, or intended "execution of any Act of Parliament, "or of any public duty or authority, or "in respect of any neglect or default "in the execution of any such Act, "duty or authority, unless it is com-"menced before the expiration of one "year from the date on which the cause "of action accrued: . . . (2) The "foregoing provisions of this section "shall not apply to any action to "which the Public Authorities Pro-"tection Act, 1893, does not apply, or "to any criminal proceeding."

S. 31: "(1) . . . 'Action' includes "any proceeding in a court of law."

Parker J., in his judgment, found that Wimpeys were two-thirds and the corporation one-third to blame for the plaintiff's injuries, and he gave judgment for the plaintiff against Wimpeys; but he held that the corporation was a public authority, and accordingly that as the plaintiff had added the corporation as defendants more than a year after the date of the accident, his action against the corporation was statute-barred and failed. He then considered the third-party claim of Wimpeys against the corporation for contribution, and held that Wimpeys were not entitled to contribution under section 6 (1) (*c*) of the Act of 1935, because the corporation had been held not liable to the plaintiff and were thus tortfeasors who did not fall within the scope of either limb of subsection (1) (*c*) as "any other tortfeasor who "is, or would if sued have been, liable in respect of the same "damage."

Wimpeys now appealed in the third-party proceedings.

W. J. K. Diplock Q.C. and *Stanley Rees* for the contractors (Wimpey & Co. Ld.). Three points of law arise. First, is the action for statutory contribution an action to which section 21 of the Limitation Act, 1939, applies? It is submitted that it is not, and that the ordinary six-year limitation period applies. It is conceded that "action," as defined in section 31, covers third-party proceedings. Section 21 does not protect the corporation because the action for contribution is not brought "in respect of "any neglect or default" on the part of a public authority, but "in respect of" a statutory right to recover contribution under section 6 (1) (*c*) of the Law Reform (Married Women and Tortfeasors) Act, 1935. That Act dealt with two mischiefs in the existing law in relation to proceedings by injured persons against wrongdoers and between wrongdoers themselves. It was intended to cure the mischief by which reparation made by an individual wrongdoer depended on the whim of the plaintiff in deciding which wrongdoer to sue, and, if he sued more than one, against which he would enforce his judgment. Section 6 (1) (*c*), by the words "would if sued have been, liable," created a wholly new statutory right conferred directly on the tortfeasor himself, and was intended to provide that guilty parties should all be treated by the law in the same way, and to enable one tortfeasor to recover contribution from another. If there is any ambiguity in the section, it should be construed as conferring a right on the tortfeasor which cannot be affected by any action of the plaintiff.

In the cases on this matter it has been assumed, apparently, that the action for contribution does fall within section 21, but that assumption was made per incuriam, for in *Tuckwood* v. *Rotherham Corporation*[3] (not cited to Parker J. or in the other relevant cases) the Court of Appeal, in a claim for indemnity under section 6 of the Workmen's Compensation Act, 1906, decided, on a closely analogous Act—the Public Authorities Protection Act, 1893, s. 1 (*a*)—that an action for statutory indemnity did not fall within the words "an action . . . in respect of "any alleged neglect or default . . .": see *per* Bankes, Scrutton and Atkin L.JJ.[4] on the words "in respect of." On that authority, it is submitted that an action for contribution does not fall within section 21.

[DENNING L.J. The reasoning in that decision applies exactly on this point, for it was held that, though negligence was the foundation of the claim, the action was not "in respect of" negligence, but only in respect of the statutory indemnity. The cases do seem similar.]

[SINGLETON L.J. Is this court asked to say on that authority that, at any time when there are third-party proceedings against a public authority, section 21 is not applicable?]

Yes, for the ratio decidendi in *Tuckwood's* case[3] precisely covers the present case. Moreover, subsection (2) of section 21 gives the case almost statutory authority for the proposition that an action for statutory contribution or indemnity, though based on the original default of a public authority, is one to which the ordinary six-year limitation period applies, for the subsection says in effect that Parliament has not overruled former decisions under the Act of 1893.

Secondly, if section 21 does apply to such an action, at what date does the cause of action accrue? It is submitted, and Parker J. was satisfied, on the authority of *M'Gillivray* v. *Hope*,[5] that it arises when payment is made by the first tortfeasor; or, alternatively, when the first tortfeasor's liability is ascertained by judgment or possibly by admission or compromise. In *Merlihan* v. *A. C. Pope Ld., Pagnello Third Party*,[6] Birkett J. (to whom the House of Lords decision in *M'Gillivray's* case[7] was not cited) decided that the cause of action against the third party accrued on the date of the accident, and, applying section 21, he held that the defendant's claim in that case to recover contribution from the third party was statute-barred.

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[3] [1921] 1 K.B. 526.

[4] Ibid. 533, 536, 538.

[5] [1935] A.C. 1; 50 T.L.R. 475.

[6] [1946] K.B. 166; 61 T.L.R. 508; [1945] 2 All E.R. 449.

[7] [1935] A.C. 1.

[DENNING L.J. Yet, though the result of *M'Gillivray's* case [7] and *Tuckwood's* case [8] appears to be that the corporation here could only put up a six-year limitation period against a claim for contribution, Parker J. held that Wimpeys, the present appellants, have no claim to contribution at all?]

Yes, and that introduces the third submission for Wimpeys, namely, is the right of one tortfeasor to recover contribution from any other tortfeasor defeated where the injured person has failed in an action against that other tortfeasor for some reason other than that that other was not guilty of the tort?

[DENNING L.J. One might say, has failed on a procedural ground and not on the claim of substance?]

Yes. It is submitted that the answer is No, and that the right is only barred if the other alleged tortfeasor has been found not guilty of the tort. But Parker J. held that because the *plaintiff* had joined the corporation after time had run, and had failed against them because of the Limitation Act, Wimpeys could not recover contribution from them. The judge construed section 6 (1) (*c*) of the Act of 1935 as dividing the "other tort-"feasor" into two categories: (1) those who have been sued, and (2) those who have not been sued; and decided that the corporation did not come into either category. His construction of "would if sued have been, liable" in the second limb of the subsection required the qualifying words "*if not sued at any* "*time*, would if sued have been, *held* liable." For a conflicting decision in a claim involving the limitation period under the Fatal Accidents Act, 1846, see the judgment of Donovan J. in *Morgan* v. *Ashmore, Benson, Pease & Co. Ld. and Samuel Fox & Co. Ld.* [9]; his construction of the subsection supports the present submission.

The section, it is submitted, should be construed as follows: if "liable" in the first limb of the subsection means "respon-"sible," Wimpeys must succeed because the corporation have been found one-third responsible. But if, as Parker J. agreed, "liable" means "held liable by judgment," so that no right of action for contribution arises until payment is made, the subsection gives the potential right against two classes of wrongdoers: (a) a tortfeasor whose liability has been established by judgment recovered by the plaintiff; and (b) a tortfeasor against whom judgment *could* have been obtained, but has not been obtained in fact. That requires one to assume a hypothetical suit which has never taken place and to read words into the second limb so that it reads: "if sued *at the time when the cause of action arose*, "would have been, liable." The corporation would then fall into that second category—they have been found one-third "responsible" for the damage, and, if sued in a properly constituted action at the time the cause of action arose, would have been held liable. It is submitted that that produces a result which is consistent with common sense and cures the mischief at which the Act of 1935 was aimed. If Parker J.'s construction is accepted, it not only puts unnecessary words into the subsection, but reintroduces the mischief, because it leaves to the whim of the plaintiff, in deciding whom to sue, the determination of the proportions of reparation to be made by two or more wrongdoers. Parker J. held that though Wimpeys had a claim to contribution before the plaintiff added the corporation as defendants, they lost it altogether and forever when the corporation was added. It is submitted that the construction of Donovan J. in *Morgan's* case [9] is to be preferred, and that Wimpeys should be entitled to bring an action for contribution against the public authority within the ordinary six-year period of limitation. [Reference was also made to *Hordern-Richmond Ld.* v. *Duncan*,[10] in which Cassels J., like Donovan J. in *Morgan's* case,[11] doubted Birkett J.'s decision in *Merlihan's* case.[12]]

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[7] [1935] A.C. 1.
[8] [1921] 1 K.B. 526.
[9] [1953] 1 W.L.R. 418; [1953] 1 All E.R. 328.

L. G. Scarman for British Overseas Airways Corporation. The corporation do not fall within either class of tortfeasors against whom contribution may be recovered under section 6 (1) (*c*), but into a third class of tortfeasor overlooked or omitted by the Act of 1935, namely, a person who is liable, i.e., responsible in law, for, in this case, one-third of the damage, but who has been held not liable because of the protection given by Parliament to public authorities. The possibility or existence of this third category was not considered or argued in the other cases cited.

If "liable" means "held liable," the classes of tortfeasor are (a) those who are sued, and (b) those who are not sued. The corporation does not come into class (a) because they were sued and held not liable; therefore they do not come into class (b) at all. If that results in the hardship that in certain circumstances the tortfeasor is still to some extent at the whim of the plaintiff, that is for the legislature and not for the courts to cure. It would also be hardship on public authorities if they lost the benefit of section 21 in proceedings for contribution.

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[9] [1953] 1 W.L.R. 418.

[10] [1947] K.B. 545; 63 T.L.R. 193; [1947] 1 All E.R. 427.

[11] [1953] 1 W.L.R. 418.

[12] [1946] K.B. 166.

[DENNING L.J. But it is so capricious. I can understand the statute working hardly, but not capriciously.]

The subsection can be read without inserting any of the words suggested. Though *Tuckwood* v. *Rotherham Corporation* [13] is of formidable persuasive force against the corporation here, it dealt with a different right under a different Act (that of 1906) and also with a different Act (that of 1893), and whatever the position under those Acts and the rights conferred by them, the action to recover contribution under the Act of 1935 is an action " in respect " of the neglect or default " of a public authority within the meaning of section 21 of the Act of 1939. To succeed under section 6 (1) (*c*) the tortfeasor who brings proceedings for contribution must show that the person against whom he brings them is himself a tortfeasor " in respect of the same damage." The ordinary construction of " in respect of " there covers the present case and, read in conjunction with the Limitation Act, the words " in respect of " in section 21 are apt to cover the cause of action given by section 6 (1) (*c*). *Tuckwood's* case [13] is no more than analogous, and the implied intention of Parliament not to interfere with that decision said to be found in subsection (2) of section 21 means no more than that if the point discussed in that case arose again under the Workmen's Compensation Acts, *Tuckwood's* case [13] would be a binding precedent. It is not binding authority in a case dealing with another statute and a different cause of action.

Secondly, if that first submission, which Parker J. decided in favour of the corporation, is wrong, then it is contended that the date at which the cause of action accrues and the right to contribution arises is the date of the accident, i.e., when the tort is complete; and as more than one year had elapsed between that date and the third-party proceedings against the corporation, they are entitled to the protection of section 21 of the Act of 1939. That results from what Birkett J. decided in *Merlihan's* case,[14] but Parker J. decided against the corporation on that point. Support for that submission is obtained from the fact that proceedings for contribution are almost always brought before the tortfeasor who brings them has had his liability to the plaintiff ascertained. Thus it would appear that our law recognizes the existence of some right before judgment obtained or the amount of contribution has been ascertained.

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[13] [1921] 1 K.B. 526.

[14] [1946] K.B. 166.

[DENNING L.J. That is only machinery.]

That may be; but it is unusual for the courts to entertain proceedings before rights have accrued. To sustain the submission that the cause of action for contribution arises at the date of the tort, the word "liable" in the first part of section 6 must be read as "answerable in law": see *Knapp* v. *Railway Executive*,[15] which gives some support for that construction; and the same word "liable" in paragraph (*c*) must be read as "held liable." On that construction, which may have been intended by the legislature, the right of the tortfeasor—here Wimpeys—to bring the action for contribution would vest in the tortfeasor, not at the whim of the plaintiff nor after ascertainment or payment, but immediately; and he could bring it against another tortfeasor, irrespective of whether that other tortfeasor had or had not been sued. On that construction it would only work injustice in cases where limitation of action applied. The words of the subsection itself support the construction of "held liable." The corporation in the circumstances of the case are not within either category covered by the subsection and are therefore not liable for contribution.

Diplock Q.C. replied.

Cur. adv. vult.

SINGLETON L.J. stated the facts, and continued: Parker J. held that section 21 of the Limitation Act, 1939, provided a defence to the plaintiff's claim against the corporation, and that the action failed as against them. Thereupon he had to consider the claim of Wimpeys against the corporation for contribution. On that claim the judge held that Wimpeys were not entitled to an order for contribution against the corporation, though but for the defence under section 21 he would have given judgment against them in the action, and in the third-party proceedings would have ordered them to contribute one-third of the damages.

The right to contribution in the circumstances of this case depends on section 6 (1) (*c*) of the Law Reform (Married Women and Tortfeasors) Act, 1935. [His Lordship read the section and continued:] The machinery by which the right can be enforced is provided by R.S.C., Ord. 16A. The decision of Parker J. on the claim to contribution was based entirely on the wording of section 6 (1) (*c*). He held that the claim failed on the ground that it had not been shown that the corporation was a tortfeasor who either "is, or would if sued have been, liable." It is said on behalf of Wimpeys that the findings of the judge that the responsibility for the collision was to the extent of one-third on the corporation is sufficient to entitle Wimpeys to an order for contribution; that their cause of action against the corporation only arose on judgment against them in the action; if it were otherwise, it was argued, the rights of the defendant against the third party could be defeated by the plaintiff.

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[15] [1949] 2 All E.R. 508.

The position is to be determined by section 6 (1) (*c*) of the Act of 1935. It appears to me that the draftsman of the subsection had in mind a suit in which there were one or more defendants, and it was sought to provide that after judgment in the action contribution could be ordered as between the defendants, and, further, that a tortfeasor who had not been sued in the action, but who was brought in as third party, might be ordered to make contribution if he would have been liable in respect of the same damage if he had been sued. In that way the natural meaning of the word "liable" in the first line of the subsection is "held liable," and the words "who is . . . "liable" two lines later would have the same meaning. I am prepared to assume that the meaning of "liable" ought not to be limited to "held liable," and that if a tortfeasor paid a claim he might have a right to contribution. In such a case he would have to prove: (a) that he was a tortfeasor; and (b) that he was liable at the time he paid. And it would be open to the one against whom contribution was claimed to raise any defence which was open to the one who claimed contribution.

The action by the plaintiff was not begun until 21 months after the commission of the tort. At that time an action against the corporation could not have succeeded if section 21 of the Limitation Act was pleaded. They were not held to be liable in the action in which they were subsequently added as defendants. Mr. Diplock sought to establish that they were in the position of a tortfeasor who would, if sued, have been liable in respect of the same damage. I find difficulty in treating a tortfeasor who has been sued as though he had not been sued. And I find still greater difficulty in treating such a tortfeasor as one who would have been liable if he had been sued when he is sued in the action and is held not to be liable. I cannot see how a judge who has held that a defendant is not liable can immediately thereafter say that he would have been liable if he had been sued.

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The claim of Wimpeys can only succeed if one is to read into the subsection after the word "sued" some such words as "in "time" or "before any period of limitation had run." There may be omissions in the subsection; it may not have provided for every eventuality; but it is not legitimate to introduce words into the subsection. A reasonable interpretation can be given to it as it stands, though it does not go as far as it might have done. The claim does not fall within either limb of the subsection. The duty of the court is to apply the subsection as it stands, not to extend it. I agree with the judgment of Parker J.

That is all that it is necessary to say for the determination of this appeal, but as much time was devoted to argument on section 21 of the Limitation Act, 1939, perhaps I ought to say something on it. One question which was raised was as to the time at which the cause of action of a defendant against a third party arose. In *Merlihan* v. *A. C. Pope Ld., Pagnello Third Party,*[1] a case rather like this, Birkett J. held that the cause of action accrued on the commission of the tort. It is right to say that authorities were not cited to him. In a later case, *Hordern-Richmond Ld.* v. *Duncan,*[2] Cassels J. took a different view, with which Parker J. agreed in the judgment now under appeal. The adoption of the view of Birkett J. would lead to simplification, for there seems to be something incongruous in the position of two defendants who are sued in respect of an accident when one puts (or both put) forward a claim to contribution and it can be said that the cause of action of the plaintiff arises on the date of the accident and the cause of action as to contribution arises on a later date (or dates). None the less, it is difficult to see what cause of action a person who is indirectly involved in an accident has if he has suffered no damage. If he is sued he can make use of the third-party procedure. It may be that his cause of action accrues when the writ in the action is served on him—but that was not argued—and I am content to adopt the view of Parker J. that the cause of action arises when the defendant is held liable, that is, when judgment is given against him, and that Ord. 16A is merely machinery for the convenient determination of the position which may arise subsequently. This is in accordance with the decision of Wright J. in *Wolmershausen* v. *Gullick*[3] and in the ordinary case it avoids the possibility of any injustice to a defendant as against a third party. The form of order in use in contribution cases where both are defendants provides that, on one defendant paying the whole, he shall be at liberty to enter judgment against the other for the proportion of damages and costs found against him.

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[1] [1946] K.B. 166.

[2] [1947] K.B. 545.

[3] [1893] 2 Ch. 514, 529; 9 T.L.R. 437.

Mr. Diplock submitted that a claim to contribution did not fall under, and was not affected by, section 21 of the Limitation Act. He cited in support of that argument the decision of the Court of Appeal in *Tuckwood* v. *Rotherham Corporation.*[4] The claim in that case arose under section 6 (2) of the Workmen's Compensation Act, 1906, and it was held that section 1 (*a*) of the Public Authorities Protection Act, 1893, did not apply to such a claim. It had been held in an earlier case that the Public Authorities Protection Act did not apply to a claim by a workman under the Workmen's Compensation Act, and Scrutton L.J. said[5]: "In the first place there is the decision of the Court of "Appeal in *Fry* v. *Cheltenham Corporation*[6] that to a claim by "a workman employed by the corporation against the corporation "for compensation under the Workmen's Compensation "Act, 1906, the Public Authorities Protection Act, 1893, does "not apply. I take the ground of the decision to be that the "Act of 1893 deals with claims based on acts or neglects, and "that the liability under the Workmen's Compensation Act is "not based on acts or neglects, but on the statutory conse- "quences of a contract to employ. It seems to me, and this is "my first ground, that, if one starts with the proposition that "claims by workmen under the Workmen's Compensation Act "are not within the Public Authorities Protection Act, the "subsidiary claim against public authorities for indemnity "against the workmen's claims must also be outside the Public "Authorities Protection Act. If it were necessary to strengthen "my view, it has been decided by Bray J. in *Smith's Dock Co.* "v. *Readhead & Sons*[7] that the claims on which an employer "can recover an indemnity are not limited to claims which can "be made by the workman's dependant at common law. In "that case the defendants had been guilty of negligence, causing "injury to a workman in consequence of which he died shortly "afterwards. His illegitimate daughter obtained compensation "under the Workmen's Compensation Act from the employer, "and indemnity was obtained against the defendants in

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[4] [1921] 1 K.B. 526.

[5] Ibid. 535.

[6] (1912) 81 L.J.K.B. 41; 28 T.L.R. 16.

[7] [1912] 2 K.B. 323; 28 T.L.R. 387.

"respect of the compensation so paid to the illegitimate "daughter, though the daughter could not have claimed damages "against the defendants, because under Lord Campbell's Act "such an action could not have been brought on behalf of an "illegitimate child. That appears to me to strengthen my view "that this action under the Workmen's Compensation Act is "outside the provisions of the Public Authorities Protection Act. "Secondly, and in some respects this is very like the first "ground, I think, looking at the words of the Public Authorities "Protection Act, that the claim against the corporation is not "for an act done in execution of an Act of Parliament or of a "public duty or authority, or in respect of a neglect in the "execution of any such Act, duty, or authority. It is true that "negligence is one of the ingredients of the liability to indemnify, "but there are several other ingredients of the liability—namely, "that the person asking for indemnity has, under the Workmen's Compensation Act, either paid or been compelled by an "order to pay the compensation provided by the Act, which may "be something quite different from the damages which would "follow at common law for an act of negligence. In my view "on that ground also, which I gather is the view adopted by my "Lord, the case does not come within the words of the Act."

I do not regard the decision in that case as helpful in forming a view on the question now under consideration. The right to contribution between tortfeasors is given by section 6 (1) (*c*) of the Act of 1935. The procedure applicable is set forth in Ord. 16A—see particularly rr. 1, 3 and 12. That Order followed the provisions of section 39 of the Judicature Act, 1925, which gave power to the court or a judge to grant: "(*b*) all such relief "relating to or connected with the original subject of the cause "or matter, claimed in like manner against any other person, "whether already a party to the cause or matter or not, who has "been duly served with notice in writing of the claim pursuant "to rules of court or any order of the court, as might properly "have been granted against that person if he had been made a "defendant to a cause duly instituted by the same defendant "for the like purpose"; and subsection (2) of section 39 provides: "Every person served with any such notice as aforesaid "shall thenceforth be deemed a party to the cause or matter "with the same rights in respect of his defence against the claim "as if he had been duly sued in the ordinary way by the "defendant."

Under r. 3 of Ord. 16A the third party becomes a party to the action with the same rights in respect of his defence against any claim made against him, and otherwise, as if he had been sued by the defendant. From this it follows that a defence under section 21 of the Limitation Act is available to a third party. And I would add that section 31 (1) provides: "'Action' "includes any proceeding in a court of law. . . ."

I am in favour of dismissing the appeal.

DENNING L.J. It must seem strange to a private individual that the big contracting firm of George Wimpey & Co. Ld. can be sued at any time within six years after an accident, whereas the Government-controlled British Overseas Airways Corporation can only be sued within one year. This distinction arises because British Overseas Airways Corporation is a public authority and Wimpeys are not. In June, 1949, a strong committee, presided over by Lord Tucker, recommended that there should be no such distinction. It was manifest, they said, that injustice often results to the individual from the one-year limitation for public authorities; and they observed significantly that it was only those who benefited from the one-year limitation who considered that it should continue. Yet nothing has been done to carry out the recommendations of the committee, and more than four years have now elapsed since they made their report. It reminds me of the case we heard a little while ago about the hall-marking of gold articles; 73 years ago a committee recommended that the law should be consolidated and amended without delay, and yet nothing has so far been done.

In the present case it is not the injured man who suffers by the distinction. It is Wimpeys. Both British Overseas Airways Corporation and Wimpeys were to blame for the accident. Wimpeys have been made to pay the full damages to the injured man, and now, when they claim contribution from British Overseas Airways Corporation, it is said that they cannot get it because the injured man did not sue British Overseas Airways Corporation within one year. He did not sue either of them within one year. Nearly two years elapsed before he started an action. I do not suppose that he would have sued British Overseas Airways Corporation even then but for the fact that he was advised (wrongly, as it turns out) that they were not a public authority. Acting on that erroneous advice he sued British Overseas Airways Corporation. He succeeded in showing that they were to blame, but he did not get judgment against them, because they were protected by the one-year limitation. On this account it is said that Wimpeys have no right of contribution from the British Overseas Airways Corporation.

It was conceded on behalf of British Overseas Airways Corporation that, if the injured man had not sued British Overseas Airways Corporation at all, Wimpeys could have got contribution; but it is said, as he sued them and failed, Wimpeys cannot get contribution. If such be the law, I can only say that it is most unsatisfactory. It means that the right of Wimpeys to contribution is defeated by something over which they had no control and with which they had nothing to do. It is defeated by the conduct of the injured man, first, in delaying to sue British Overseas Airways Corporation for more than a year; and, secondly, in thinking that British Overseas Airways Corporation were not a public authority and not protected by the one-year limitation.

To see whether this is indeed the law, it is necessary to construe section 6 (1) (*c*) of the Law Reform Act of 1935, which gives the right to contribution. The critical question is: what is the meaning of the word "liable"? There are two rival views: one is that "liable" means "held liable." According to this view a person is not liable for the damage unless and until he has had judgment entered against him. The other view is that "liable" means "responsible in law." According to this view a person may be liable for the damage even though he has not been sued to judgment.

In my opinion, the ordinary meaning of the word "liable" in a legal context is to denote the fact that a person is responsible at law. Thus, when it is said (as Lord Chelmsford L.C. said in a leading case, *Bartonshill Coal Co.* v. *McGuire*[8]), that a master is liable for the wrongdoing of his servant, that means that he is responsible for it in a court of law. It does not mean that he has actually been sued for it. Furthermore, a man may be "liable" in this sense even though the remedy against him is suspended or barred for some reason or other. The law of England is familiar with the concept of a liability which exists in the eye of the law, though it may not be enforceable by action. It is perhaps more familiar in contract than in tort. Everyone knows that a contract is good even though it may not be enforceable owing to the Statute of Frauds, and that a debt which is statute-barred is still a debt even though the debtor may, if sued, raise the Statute of Limitations. The same concept applies

[8] (1858) 3 Macq. 300, 306.

also in tort. Thus a thief is liable for his tort of conversion (which is also a felony) though he cannot be sued for it until he has been prosecuted: *Smith* v. *Selwyn*.[9] A diplomat is liable for a tort committed by him, although it is not enforceable against him if he claims diplomatic privilege: *Dickinson* v. *Del Solar*.[10] An injured party who has incurred hospital expenses which have not been paid and have become statute-barred, can recover them from a tortfeasor: *Allen* v. *Waters & Co.*,[11] *per* Goddard J. A husband who has injured his wife by his negligence is guilty of a tort, but it is enforceable only against his master, not against the husband himself: *Broom* v. *Morgan*.[12]

In the present case,[13] the judge has found against British Overseas Airways Corporation on the issue of liability, but in their favour on the Statute of Limitations. If the word "liable" in section 6 (1) (*c*) is construed in the sense which I have mentioned, which I venture to think is its ordinary meaning, no injustice will result at all; whereas if it is construed as meaning "held liable by judgment" much injustice will result. Let me give some illustrations: 1. If "liable" means "held liable," it would follow that no tortfeasor could claim contribution unless he had been sued to judgment in the courts. That would be a most unreasonable interpretation. As a matter of good sense it ought to be open to a tortfeasor to admit his liability and pay for the damage and then claim contribution from any other tortfeasor. It should not be necessary for the first tortfeasor to contest the claim in the courts before he can recover contribution. That would be so obviously a waste of time and money that Parliament cannot have intended it. When he comes to enforce his right of contribution, however, it must be open to the second tortfeasor to say: "You need not have "paid, because you were not liable at all." The court then inquires into his liability in this sense, that it sees whether the first tortfeasor was "responsible at law" for the damage. If it finds him to be responsible, and also the second tortfeasor to be so, it awards him contribution. This was assumed to be the law in *Knapp* v. *Railway Executive*,[14] and I have no doubt that it is correct: see *Page* v. *Burtwell*, *per* Farwell L.J.[15]

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[9] [1914] 3 K.B. 98.

[10] [1930] 1 K.B. 376, 380; 45 T.L.R. 637.

[11] [1935] 1 K.B. 200, 215; 51 T.L.R. 50.

[12] [1953] 1 Q.B. 597; [1953] 2 W.L.R. 737; [1953] 1 All E.R. 849.

[13] [1953] 1 W.L.R. 426; [1953] 1 All E.R. 583.

[14] [1949] 2 All E.R. 508.

[15] [1908] 2 K.B. 758, 763.

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2. If "liable" means "held liable" it would put it in the power of the injured party to decide whether one tortfeasor should get contribution from another or not. If the injured party wished to help one of two tortfeasors, all that he would have to do would be to execute a deed releasing him, or simply allow the period of limitation to run against him, whereupon it would be clear that that tortfeasor, "if sued," would not be "held liable." Nay more, the injured party could bring a hopeless action against that tortfeasor and allow judgment to be entered for him on the ground of a release or the Statute of Limitations; whereupon that tortfeasor could say that he had in fact been sued, and had not been "held liable." The same result may be reached without any design on the part of the injured party, but simply by delay, as here, on his part, or by an error in point of law. It is impossible to suppose that Parliament contemplated that the right to contribution should depend on such chances. Surely the sensible interpretation is that, if the first tortfeasor brings an action for contribution, the second tortfeasor should be able to resist it on the ground that he was not "liable"; that is, not responsible in law for the damage; but he should not be able to resist it on the ground that, although liable, he escaped for some special reason rendering his liability unenforceable, such as a release, or the Statute of Limitations.

3. When a wife is injured by the negligence of her husband and also the negligence of a stranger (as may happen in a motor accident) the wife is entitled to sue the stranger for the whole damage she has suffered, but she cannot sue her husband, because one spouse cannot sue the other for a tort. In point of law, the husband is guilty of a tort, but his wife cannot sue him for it: see *Broom* v. *Morgan*.[16] Suppose that the wife makes the stranger pay the whole damages, can the stranger recover contribution from the husband on the ground that the husband was also to blame? One would have thought that in justice he ought to be able to do so, but in law it depends on the meaning of the word "liable" in section 6 (1) (*c*). If "liable" means what I think it does, "responsible at law," the stranger can recover contribution from the husband, as he ought to do; but if it means "held "liable," he cannot. I am aware that in two cases it has been assumed that "liable" means "held liable," and that the husband has escaped paying any contribution, see *Chant* v. *Read*[17]

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[16] [1953] 1 Q.B. 597.

[17] [1939] 2 K.B. 346; 55 T.L.R. 624; [1939] 2 All E.R. 286.

and *Drinkwater* v. *Kimber* [18]; but the point about the meaning of the word "liable" was not argued and is therefore, I suggest, open to reconsideration.

Furthermore, if the word "liable" in the opening words of section 6 (1) (*c*) means "responsible at law" (as was assumed in *Knapp* v. *Railway Executive*),[19] then it should be given the same meaning in the succeeding words. It is a well-settled rule of construction that the same word occurring in the same document should, prima facie, be given the same meaning whenever it occurs. All the more so in the same sentence.

The only argument against this interpretation of the word "liable" is the words "if sued." The insertion of those words makes it look as if the legislature used the word "liable" in the sense of "held liable." I think that this is too narrow a view. The legislature clearly intended to be comprehensive. They intended to cover any other tortfeasor, whether sued or not, who was responsible in law for the damage. It would be a strange thing if these words, which were intended to have a comprehensive effect, should be interpreted so as to narrow the right to contribution and to make it dependent on the action or inaction of the injured party. These considerations lead me to the conclusion that "liable" does not mean "held liable by judgment." It means "responsible in law" for the damage.

If, however, the word "liable" means "held liable," then I think it plain that the words "if sued" must be expanded so as to read "if sued by the injured party at the time when the "cause of action arose." If one is to envisage a hypothetical action, then one must envisage an action brought in time to be an effective action and not one which is statute-barred. When the words "if sued" are so expanded, then there are two categories of tortfeasors against whom contribution can be claimed: (1) those who have been sued and held liable; (2) those who would, if sued in time, have been held liable. British Overseas Airways Corporation fall clearly within the second category of tortfeasors who would, if sued in time, have been held liable. It is no answer for them to say that they were in fact sued out of time. That only means that they are not within the first category of tortfeasors "held liable." It still leaves them inside the second category of those who, if sued in time, would have been held liable. I find myself in complete agreement with the reasoning of Donovan J. on this point in

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[18] [1952] 2 Q.B. 281; [1952] 1 T.L.R. 1486; [1952] 1 All E.R. 701.

[19] [1949] 2 All E.R. 508.

Morgan v. *Ashmore, Benson, Pease & Co. Ld. and Samuel Fox & Co. Ld.*[20]

Applying this interpretation of the statute to the facts of this case, it is clear that Wimpeys are tortfeasors liable for the damage, and that British Overseas Airways Corporation are other tortfeasors " liable " for the damage in the sense that they are responsible in law as tortfeasors in respect of it; and in any event, they would, if sued in time, have been " held liable " for it. The right to contribution is therefore complete.

One more question, however, arises. Although Wimpeys have a right to contribution from British Overseas Airways Corporation, is their remedy for it barred by the one-year limitation contained in section 21 of the Limitation Act, 1939? This depends on when the cause of action for contribution arises. If it arises at the date of the accident (as Birkett J. held in *Merlihan* v. *A. C. Pope Ld., Pagnello Third Party*[21]) then the remedy would be barred; but I do not think that that is correct. It seems to me clear that a tortfeasor cannot recover contribution until his liability is ascertained. If he has not been sued and has paid nothing and admitted nothing, he can have no cause of action for contribution, for the simple reason that he may never be called on to pay at all. The damaged plaintiff may go against the other tortfeasor only. Once the liability of the first tortfeasor has, however, been ascertained by judgment against him or by admission, then he has a cause of action for contribution against the second tortfeasor. He can obtain a declaration of his right to contribution and a prospective order under which, whenever the first tortfeasor has paid any sum more than his share, he can get it back from the second tortfeasor.

A close analogy is the right of one surety to contribution from a co-surety. His right at law did not accrue until he had paid more than his share, *Davies* v. *Humphreys*[22]; but his right in equity (which now prevails) arose when his liability was ascertained and the Statute of Limitations then began to run. (*Wolmershausen* v. *Gullick*[23]; *Robinson* v. *Harkin*.[24]) In cases where a writ is issued against the first tortfeasor and he serves a third-party notice against the second tortfeasor, the notice is convenient machinery, but it does not mean that he has then a cause of action. His cause of action only arises when judgment is given against him ascertaining his liability. On this footing

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[20] [1953] 1 W.L.R. 418, 419.

[21] [1946] K.B. 166.

[22] (1846) 6 M. & W. 153, 168–9.

[23] [1893] 2 Ch. 514.

[24] [1896] 2 Ch. 415; 12 T.L.R. 475.

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it is clear that the remedy of Wimpeys against British Overseas Airways Corporation is not statute-barred because they put in their claim at once.

What is the actual period of limitation applicable to the right to contribution? At first sight it would appear to be the 12 months provided by section 21 of the Act because British Overseas Airways Corporation are a public authority and the action is brought "in respect of" neglect in the execution of their public duty. But the decision of this court in *Tuckwood* v. *Rotherham Corporation*,[25] in my view, binds us to hold that the words "in respect of" do not cover an action for indemnity where, beside the neglect, there are other ingredients necessary to give rise to the cause of action. The reasoning in that case covers this case also, and I do not think that we should depart from it, especially in view of the injunction contained in section 21 (2) of the Act. The period of limitation is therefore not the one year provided by section 21, but the ordinary period of six years provided by section 2. In this case, however, it does not matter, because in either case Wimpeys brought their claim in time.

My conclusion is, therefore, that Wimpeys have a right to contribution from British Overseas Airways Corporation. That right is not barred by statute, and they should recover. I would be in favour of allowing the appeal accordingly.

In conclusion I would just say this: there is an obvious gap in section 6 (1) (*c*) of the Act of 1935. The legislature did not have in mind the case of tortfeasors who had special defences available against the injured party, such as a public authority with a one-year limitation, and a spouse who has immunity from suit. If the courts cannot close this gap, then I hope that Parliament will soon do so. It is fourteen years since the first case in the courts exposed the gap (*Chant* v. *Read* [26]), and subsequent cases have served to show how wide it is.

MORRIS L.J. This case affords vivid illustration of the difficulties which can arise where different periods of statutory limitation of action apply to different tortfeasors who are concerned in respect of the same damage. The plaintiff suffered damage on July 28, 1949. When judgment in regard to his claims was delivered on January 29, 1953, the judge held that the "blame" for his injuries should be assigned as to two-thirds to Wimpeys and as to one-third to British Overseas Airways Corporation. But judgment had to be entered against Wimpeys alone, for the plaintiff had not begun his action against British Overseas Airways Corporation " before the expiration of one year " from the date on which the cause of action accrued." British Overseas Airways Corporation had pleaded section 21 of the Limitation Act, 1939, and that the claim of the plaintiff related to acts or omissions of British Overseas Airways Corporation while acting in intended execution of an Act of Parliament. No challenge has been made on appeal as to the correctness of absolving British Overseas Airways Corporation from liability to the plaintiff.

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[25] [1921] 1 K.B. 526.

[26] [1939] 2 K.B. 346.

The appeal concerns only the question whether Wimpeys are entitled to contribution against British Overseas Airways Corporation. This question involves problems of great difficulty in regard to the construction of section 6 of the Law Reform (Married Women and Tortfeasors) Act, 1935. The only claim to contribution which Wimpeys can, or do, assert is that which they can derive from the wording of that section. No considerations as to hardship or policy are relevant save as involved in any submissions based on the scheme and purpose of the Act. If certain public authorities can feel secure from claims after the lapse of a statutory period and after the safety-curtain of time has been thought to have been lowered, it might be said to be contrary to the intention of the legislature if this security can be indirectly assailed. On the other hand, it might be said to be inappropriate that the full burden should be carried by one tortfeasor when another shared his blame. But these and similar competing considerations must be excluded. The words of the section are to be regarded, and rights and liabilities depend solely on the result yielded by the perplexing tasks of construction.

Before the Act of 1935 Wimpeys could not have founded a claim to contribution against British Overseas Airways Corporation. If they have a right to contribution it is a statutory right. Wimpeys' third-party notice against British Overseas Airways Corporation was dated July 6, 1951; it was amended on March 11, 1952, after the plaintiff had joined British Overseas Airways Corporation as a defendant. [His Lordship referred to the pleadings, and continued:]

The question as to the applicability of section 21 of the Limitation Act, 1939, to the claim of Wimpeys against British Overseas Airways Corporation becomes involved with the question

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as to what rights are given by the Act of 1935 and as to when they are given. Wimpeys' "cause of action" against British Overseas Airways Corporation is for contribution. Have Wimpeys been given a right to contribution? If they have, at what moment did they first possess such right? What is the nature of any such right?

Much depends on the meaning of the word "liable" in its context in section 6 (1) (*c*) of the Act. The word "liable" is a very familiar one in legal parlance and as a medium of expression is much employed. If someone is said to be liable, it is very likely that what is meant is that he is answerable at law. But no rigid or all-embracing definition can be suggested. The word may be employed with different meanings according to the context. In section 3 of the Act of 1935 it is enacted that, subject to the provisions of the Act "the husband of a married woman shall not, "by reason only of his being her husband, be liable—(*a*) in respect "of any tort committed by her whether before or after the "marriage, or in respect of any contract entered into, or debt or "obligation incurred, by her before the marriage; or (*b*) to be "sued, or made a party to any legal proceeding brought, in respect "of any such tort, contract, debt, or obligation." The word "liable" seems to have a different meaning according to whether it is applied to (*a*) or to (*b*). The husband is not to be "liable" for certain torts or contracts, and is not to be "liable" even to be sued.

The wording of section 6 (1) (*a*) is as follows: "Where "damage is suffered by any person as a result of a tort (whether "a crime or not)—(*a*) judgment recovered against any tortfeasor "liable in respect of that damage shall not be a bar to an action "against any other person who would, if sued, have been liable "as a joint tortfeasor in respect of the same damage." The words "judgment recovered against any tortfeasor liable" seem to suggest that being held liable is something different from being liable. But the later words, "any other person who "would, if sued, have been liable," seem to denote that a person is liable who would have been held liable if sued. The meaning of this part of the section is that judgment against one joint tortfeasor does not release another person who could also have been successfully sued as a joint tortfeasor.

The right to recover contribution which is given by section 6 (1) (*c*) is given to a "tortfeasor liable in respect of" the damage suffered by some person. It is given against any other tortfeasor (whether a joint or a separate tortfeasor) "who would, "if sued, have been liable . . . in respect of the same damage."

The words "would if sued" appear to me to postulate the case of someone who has not been sued. In the case of such a person who has not been sued the inquiry becomes whether he would, if he had been sued, have been "liable." It seems to me that in this context the word "liable" must mean "held "liable" or sued to judgment. Contribution may therefore be recovered from (*a*) another tortfeasor who is liable; or (*b*) another tortfeasor who has not been sued, but who, if he had been sued, would have been liable. "Liable" under group (*b*) must mean "held liable," and in the context so it must in group (*a*). The result is that contribution may be recovered from (*a*) another tortfeasor who has been held liable to the plaintiff; or (*b*) from another tortfeasor who has not been sued, but who if he had been sued would have been held liable.

Parliament might have gone on to add some other group. There might have been provision to recover contribution from a tortfeasor who has been sued, but who has been sued unsuccessfully, but who might—at some other time—have been sued successfully. But there is no such provision. Whether the omission be deliberate or inadvertent is matter of speculation. I agree with the view expressed by Birkett J. in *Merlihan* v. *A. C. Pope Ld., Pagnello Third Party*,[27] that it would not be right to read after the word "sued" in the words "or would "if sued have been" the words "in time."

I do not think that the word "liable" in the first line of section 6 (1) (*c*) need be limited to tortfeasors who have been held liable, though this matter is not now directly in issue. In the context at the beginning of (*c*) the word may include one who has properly admitted liability to the person who has suffered damage. He may then recover contribution from another tortfeasor who either (a) has been held liable in respect of the same damage; or (b) who has not been sued but who, if he had been sued, would have been held liable. It may be that in this situation the claimant would be more fortunately placed unless (in a case where the other tortfeasor has not been sued) the hypothetical proceedings must be deemed to have been begun on the date of the admission of liability.

The conclusion which I have expressed makes it unnecessary to decide the question as to the notional date of the hypothetical proceedings in the case of a tortfeasor who has not been sued at all. Thus if one tortfeasor is sued and held liable while one

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[27] [1946] K.B. 166, 170.

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who may be a tortfeasor is not sued, do the words "if sued" mean "if he had been sued at the time when the tortfeasor, "who has been held liable, was sued," which is a very reasonable view and one which may avoid some anomalies, or do they mean "if at any time he had been sued?"

If the view which I have formed is applied to the facts the result appears to be as follows. The plaintiff Littlewood on July 28, 1949, suffered damage as the result of a tort. Wimpeys never admitted liability, but by the judgments given on January 29 and February 5, 1953, they were held liable. Wimpeys came therefore within the opening words of paragraph (*c*) of the subsection, that is, the words "any tortfeasor liable in "respect of that damage." They could as from then claim to recover contribution. It seems to me that their cause of action then arose. They could not earlier claim to recover contribution, for they were denying their liability to Littlewood. They could (and did) serve a third-party notice on British Overseas Airways Corporation which would give the latter the opportunity to challenge the claim of Littlewood, but the claim of Wimpeys on British Overseas Airways Corporation would only become effective contingently on Wimpeys being held liable to Littlewood. I consider, therefore, that British Overseas Airways Corporation could not defeat Wimpeys' claim in limine by asserting that more than 12 months had elapsed since the date of the accident (July 28, 1949) when damage was suffered by Littlewood.

Comparison was made between the present situation and that which exists between surety and co-surety. But the claim made by a surety who has paid is one based in contract and in equity. In *Craythorne* v. *Swinburne* Lord Eldon L.C. said[28]: "It has "been long settled, that, if there are co-sureties by the same "instrument, and the creditor calls upon either of them to pay "the principal debt, or any part of it, that surety has a right "in this court, either upon a principle of equity, or upon "contract, to call upon his co-surety for contribution." The claim for contribution now under consideration is purely statutory and exists in the words of the subsection or not at all.

Tuckwood v. *Rotherham Corporation*[29] arose out of the provisions of section 6 of the Workmen's Compensation Act, 1906, comparable in scope to those in section 6 (1) (*c*) of the Act of 1935. The language of section 1 of the Public Authorities

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[28] (1807) 14 Ves. 160, 164.

[29] [1921] 1 K.B. 526.

Protection Act, 1893 (referred to in that case) does not differ significantly from that in section 21 (1) of the Limitation Act, 1939. Under the Act of 1893 the time is, in general, computed "next after the act, neglect or default complained of"; under the Act of 1939 the time is "from the date on which the cause "of action accrued." Under the Act of 1939 the time limit is in reference to claims which are "for any act done in pursuance, or execution, or intended execution of any Act of "Parliament, or of any public duty or authority, or in respect "of any neglect, or default in the execution of any such Act, "duty or authority"; the wording of the Act of 1893 is very nearly the same. Though it is sufficient for present purposes to say that the claim for contribution was not defeated by any statutory period of limitation, the reasoning in *Tuckwood's* case [29] would suggest that the 12 months' period of limitation was not applicable.

In *M'Gillivray* v. *Hope*,[30] which concerned contributions to be paid by former employers to the last employer of a man to whom such last employer had paid workmen's compensation, Lord Tomlin said [31]: "Further, under the English law, where "one who is liable to pay a sum of money to another is entitled "against a third party to be indemnified in whole or in part "against what he has so to pay, he cannot recover on the "indemnity against this third party where he himself has made "no payment in respect of his own liability." Though Wimpeys could start proceedings against British Overseas Airways Corporation to deal with the "event of" Wimpeys being held liable to the plaintiff, and though such procedure possessed advantages, in my judgment Wimpeys were not obliged to claim against British Overseas Airways Corporation until they (Wimpeys) were held liable to the plaintiff.

In a claim against British Overseas Airways Corporation Wimpeys would first have to prove that they were tortfeasors liable to the plaintiff; they would then have to prove, if my construction of the Act is correct, either that British Overseas Airways Corporation had been held liable to the plaintiff, or that British Overseas Airways Corporation, not having been sued, would, if they had been sued, have been held liable. Though, in dealing with this second limb, they would be concerned with the neglect or default of British Overseas Airways Corporation

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[29] [1921] 1 K.B. 526.

[30] [1935] A.C. 1.

[31] Ibid. 10.

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in the intended execution of an Act of Parliament, the claim of Wimpeys would, according to the reasoning in *Tuckwood's* case,[32] be a claim in respect of the statutory right to contribution given by the Act of 1935. Thus, Bankes L.J. in his judgment in *Tuckwood's* case said[33]: "The question thus is, is this action "claiming the right to the statutory indemnity an action in "respect of any alleged neglect in the execution of any such "duty? In my opinion it is not. It is true that in order to "succeed in the action the plaintiff must establish that the "workman would have been entitled to recover damages against "the corporation for the negligence of their servant in driving "the tramcar. That no doubt is an essential part of his cause "of action; but I do not think that it is true to say that the "action claiming the right to the statutory indemnity is an "action in respect of any alleged neglect in the execution of a "duty within the meaning of the language used in the section." Both Scrutton and Atkin L.JJ.[34] agreed with the reasoning of Bankes L.J.

Even if the claim of Wimpeys against British Overseas Airways Corporation was in respect of any neglect or default in the intended execution of an Act of Parliament the "cause of "action," in my judgment, did not accrue until Wimpeys could show that they were tortfeasors liable to Littlewood.

The careful judgment of Donovan J. in *Morgan* v. *Ashmore, Benson, Pease & Co. Ld. and Samuel Fox & Co. Ld.*[35] was not available to Parker J. before he gave his judgment in the present case. The difficulties of construction are well evidenced by the conflicting judicial opinions which have been formed.

For the reasons which I have given I consider that the legislature has specified the description of those from whom contribution may be recovered in language which, on the facts of this case, does not enable Wimpeys to recover from British Overseas Airways Corporation. I would dismiss the appeal.

Appeal dismissed.
Leave to appeal to the House of Lords granted.

Solicitors: *Stanley & Co.; J. H. Milner & Son.*

M. M. H.

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[32] [1921] 1 K.B. 526.

[33] Ibid. 533.

[34] Ibid. 534, 538.

[35] [1953] 1 W.L.R. 418.

ARAB BANK LD. *v.* BARCLAYS BANK (DOMINION, COLONIAL AND OVERSEAS).

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Apr. 27, 28, 29, 30;
May 4, 21.

Singleton, Jenkins and Morris L.JJ.

Bank—Contract of current account—Outbreak of war—Enemy customer —Whether credit abrogated—Unjust enrichment—Whether obligation to repay implied by law.

In 1949 the plaintiffs, a bank whose registered office was in Jerusalem, entered into a contract of current account with the Jerusalem branch of the defendants, who were a bank registered in England. Until May 14, 1948, Palestine was British mandated territory, but the mandate expired at midnight on that day, and simultaneously with the termination of the mandate the Provisional Council of State and Provisional Government of the State of Israel were constituted. Immediately after the mandate ended war broke out between Israel and the Arab States, and by reason of hostilities in Jerusalem further performance of the contract became impossible and the defendants' branch in Jerusalem closed on May 13, 1948, and did not reopen until July, 1948. From the date of the termination of the mandate the plaintiffs' bank was situated in Arab-controlled territory and the defendants' branch bank in Israeli territory.

In October, 1950, the plaintiffs sued the defendants (inter alia) for repayment of the credit balance as money had and received to their use, the contract of current account having been frustrated by the outbreak of war:—

Held, that the effect of war upon the contract of current account was to abrogate and destroy any subsisting right to further performance of it, but that the plaintiffs' credit balance, being a liquidated sum of money and a debt owing to the plaintiffs, was not cancelled by the outbreak of war but remained in existence subject to the suspension, for the duration of the war, of the plaintiffs' right to recover it, although they had not previously demanded payment of it.

Per Singleton L.J. With the abrogation of the contract there went the necessity for a demand.

Per Jenkins L.J. I think that the necessity for a demand should probably be regarded as surviving as a characteristic inherent in the debt.

Per Morris L.J. The right of the plaintiffs to demand payment of the credit was only suspended.

There is no obligation on a person who is by law forbidden to perform a contract for the payment of money to an enemy alien to pay the money otherwise due on the contract as money had and received or as unjust enrichment.

Joachimson v. *Swiss Bank Corporation* [1921] 3 K.B. 110; 37 T.L.R. 534, *Fibrosa Spolka Akcyjna* v. *Fairbairn Lawson Combe*

[Reported by Mrs. E. M. WELLWOOD, Barrister-at-Law.]

Barbour Ld. [1943] A.C. 32; 58 T.L.R. 308; [1942] 2 All E.R. 122, *Schering Ld.* v. *Stockholms Enskilda Bank Aktiebolag* [1946] A.C. 219; 62 T.L.R. 122; [1946] 1 All E.R. 36, *Ertel Bieber & Co.* v. *Rio Tinto Co. Ld.* [1918] A.C. 260; 34 T.L.R. 208 considered.

Schering Ld. v. *Stockholms Enskilda Bank Aktiebolag* [1946] A.C. 219; 62 T.L.R. 122; [1946] 1 All E.R. 36 applied.

Decision of Parker J. [1952] 2 T.L.R. 920; [1952] W.N. 529 affirmed.

APPEAL from Parker J.

The following statement of facts is taken from the judgments of Singleton and Jenkins L.JJ.: The plaintiffs were a company incorporated in 1930 under the Palestine Companies Ordinance, 1929. At all material times down to May, 1948, their registered office and head office was in the Anboussie Building outside the walls of the Old City of Jerusalem. In May, 1948, the plaintiffs ceased business at the Anboussie Building, and moved their Jerusalem office to the Morcos Building, which was inside the Old City. The defendants were a company incorporated in England with a number of branches overseas, and, in particular, a branch in Allenby Square, Jerusalem, situated outside the walls of the Old City and a short distance from the plaintiffs' office at the Anboussie Building.

On February 14, 1939, the plaintiffs opened a current account with the defendants' Allenby Square branch pursuant to an application made by the plaintiffs in a form which included, inter alia, a declaration by the plaintiffs that they submitted themselves irrevocably to the jurisdiction of the courts at Jerusalem.

At midnight on May 14, 1948, the British mandate over Palestine ended, and there was then standing to the credit of the plaintiffs on their current account at the Allenby Square branch the sum of £P.562,931.146.

For some time before the termination of the mandate there had been disturbances between the Jews and the Arabs in Palestine. Those disturbances increased with the announcement of the United Nations plan for the partition of Palestine between Jews and Arabs, and with the announcement made by His Majesty's Government in January, 1948, that the mandate would end at midnight on May 14, 1948. Owing to hostilities in Jerusalem the defendants' branch at Allenby Square closed on May 13 or 14, 1948, and remained closed until July. On May 15, 1948, the building in which the branch was situated was taken over by regular Jewish forces and thereafter remained at all times under the control of the Jewish authorities.

Simultaneously with the termination of the mandate, the Provisional Council of State and Provisional Government of the State of Israel were constituted by a Declaration of Independence and a Proclamation made thereunder and, without any formal declaration of war, open warfare at once broke out between the State of Israel and the Arabs in Palestine supported by the Arab States of Transjordan, Lebanon, Syria, Egypt, Saudi Arabia and the Yemen. An armistice was concluded on April 3, 1949, but technically a state of war still continued to exist.

The defendants' Allenby Square branch was situated in a part of Palestine controlled by the Government of the State of Israel, while the buildings in which the plaintiffs' head office were successively situated were in a part of Palestine controlled by the Arabs, the line of war being drawn between Allenby Square on the one side and the Anboussie and Morcos Buildings on the other.

The plaintiffs did not at any time after the termination of the mandate have any branches operating in Israeli territory. On July 1, 1948, they moved their head office to Amman, in Jordan, and became registered there on November 7, 1949.

On May 19, 1948, the State of Israel enacted a Law and Administration Ordinance, No. 1 of 1948, taking effect from May 14, 1948, which provided by article 11 that the law which existed in Palestine on May 14, 1948, should remain in force in so far as there was nothing therein repugnant to the Ordinance or to other laws which might be enacted by the State. The law which existed in Palestine on May 14, 1948, included the common law of England as regarded trading with the enemy. By the same Ordinance, the Defence (Finance) Regulations in force in Jerusalem before the cessation of the mandate were continued with certain amendments. The effect of those regulations as so continued and amended, in conjunction with a further amendment published by the State of Israel on July 14, 1948, with retrospective effect from July 4, 1948, was to make it illegal to make any payment to, or place any sum to the credit of, any person resident outside Israel.

By regulations relating to the property of "absentees," published with the authority of the Israeli Government on December 12, 1948, it was enacted that a Custodian of Absentee Property should be appointed; that any property of an absentee should be vested in the custodian upon his appointment together with any rights of the absentee in such property; that it should be the duty of any person having in his possession any property of an absentee to deliver such property to the custodian, and, where such property was in the form of a debt or indebtedness to the absentee, to pay the same to the custodian, or otherwise comply with his obligation thereunder as by him (the custodian) directed; and that no person should pay to anyone other than the custodian any such debt or indebtedness without the prior written consent of the custodian on pain of fine or imprisonment as therein mentioned. By those regulations, "absentee" was defined as meaning any owner or beneficiary of property situated within the area to which the law of Israel applied who was on November 29, 1947, or at any time thereafter in either the Lebanon, Egypt, Saudi Arabia, Syria, Iraq, Transjordan, the Yemen or in the part of Palestine to which the law of the State of Israel did not then apply; and it was provided that a company was such an absentee if it was the lawful owner of property within the area to which the law of Israel applied and if either at least one-half of its capital was at the disposition of an absentee, or one-half of its members, partners, shareholders, directors or managing directors were absentees.

Pursuant to such regulations a Custodian of Absentee Property was appointed on December 12, 1948. The regulations were replaced as from March 31, 1950, by the Absentee Property Law passed by the Israeli Government on March 14, 1950.

On October 9, 1950, the plaintiffs issued a writ claiming from the defendants the sum standing to their credit on their current account at the time of the termination of the mandate as money had and received to their use. On January 24, 1951, the Israeli Custodian of Absentee Property requested the defendants' Jerusalem branch to deliver to him by cheque all the moneys which they held in the plaintiffs' account, and on February 8, 1951, the defendants' Jerusalem branch handed over their cheque for the amount of the plaintiffs' credit balance, namely, £P.562,931.146.

On April 27, 1950, de jure recognition was accorded by His Majesty's Government to Israel, with a reservation to the effect that no more than de facto recognition was accorded in respect of Israeli sovereignty over the part of Jerusalem occupied by Israel. In April, 1951, His Majesty's Government accorded de jure recognition to the Hashemite Kingdom of Jordan (which included the part of Palestine occupied and controlled by the Arabs), with a similar reservation in respect of the part of

Jerusalem occupied and controlled by them. The reason for the reservation thus made in respect of Jerusalem was that under the partition plan it was to be international territory.

Before Parker J. the plaintiffs alleged breach of contract by the defendants, but the judge found on the facts that there had been no breach by the defendants. The substantial point on the appeal was the plaintiffs' contention that from May 15, 1948, the defendants held the balance in the current account not as bankers upon current account but as money had and received by them to the use of the plaintiffs, the contract of current account having been frustrated by war. The defendants denied that they at any time held the balance as money had and received by them to the use of the plaintiffs, and contended that if they did hold such balance as a debt immediately payable the proper law of, and the law governing payment of, the debt and the moneys had and received was the law of the area in which the branch was situate, and that any obligation of the defendants to the plaintiffs in respect of such sum was a debt or indebtedness situate at the Allenby Square branch, and that by reason of the legislation relating to the property of absentees it became unlawful for the defendants to pay the same to the plaintiffs.

Parker J. held that the credit on current account was a liquidated sum of money, the right to payment of which was not abrogated but was merely suspended by the outbreak of war, and gave judgment for the defendants.

The plaintiffs appealed.

Sir Andrew Clark Q.C., *Maurice Lyell* and *Jamal Nasir* for the plaintiffs. The question is whether the contract of current account between the plaintiffs and the defendants was frustrated on May 14, 1948, when the British Mandate in Palestine ended and war broke out between the State of Israel and the Arab States, or whether, as held by Parker J., it was merely suspended. It is agreed that the defendants' branch at Allenby Square, Jerusalem, was situated in Israeli territory after May 14, 1948, and that the plaintiffs' bank was in Arab territory, so that the parties became separated by line of war. It is common ground that the balance remaining in the current account at the date when war broke out became subject to Israeli law, which is the same as the common law of England.

A contract of current account with a banker involves a number of duties and obligations on both parties—the banker undertakes to meet cheques on demand up to the amount standing to the credit of the customer, and to credit to the account all cheques, drafts and bills of exchange, etc., the customer undertaking to exercise due care and attention in the drawing of cheques. Such a contract therefore necessarily involves continued intercourse between the customer and the branch where the account is kept. There is no debt at all owing on current account until a valid demand has been made for payment, and the contract remains wholly executory until the account is closed or until a valid demand for payment has been made. The basic relationship of banker and customer is that of debtor and creditor, but there is no obligation on the banker to pay over the balance to the customer until a demand has been made. The customer has no accrued right to sue for the balance until he has made a demand: *Joachimson* v. *Swiss Bank Corporation.*[1] The demand must be made at the branch where the account is kept, but once a demand has been made at that branch, and not complied with, the customer has a right to sue the bank wherever it can be found: *Clare & Co.* v. *Dresdner Bank* [2]; *Leader Plunket and Leader* v. *Direction der Disconto Gesselschaft* [3]; *Rex* v. *Lovitt.*[4] No demand having been made for the balance at the defendants' branch at Allenby Square, Jerusalem, where the account was kept, before the outbreak of war, it became impossible to do so afterwards, since it would have been illegal by Israeli law. Therefore there was no accrued right to sue for the balance and no debt owing by the defendants to the plaintiffs. The basic consideration for leaving the money on current account is the provision of banking services in futuro. The contract was still executory on May 14, 1948, but on the outbreak of war the further performance of banking services became illegal.

It is therefore submitted that in the circumstances of this case the contract was frustrated on the outbreak of war by supervening illegality, on the principle that all executory contracts are abrogated, and not suspended: *Schering Ld.* v. *Stockholms Enskilda Bank Aktiebolag* [5]; *Ertel Bieber & Co.* v. *Rio Tinto Co. Ld.*[6] The moment it is found that the continued existence of the contractual relationship will necessitate intercourse with the enemy there is no choice between suspension and abrogation; the contract must be abrogated: *Schering Ld.* v. *Stockholms Enskilda Bank*

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[1] [1921] 3 K.B. 110; 37 T.L.R. 534.

[2] [1915] 2 K.B. 576; 31 T.L.R. 278.

[3] (1914) 31 T.L.R. 83.

[4] [1912] A.C. 212; 28 T.L.R. 41.

[5] [1946] A.C. 219; 62 T.L.R. 122; [1946] 1 All E.R. 36.

[6] [1918] A.C. 260; 34 T.L.R. 208.

Aktiebolag, *per* Lord Atkin.[7] The only thing that can be suspended is an accrued right to sue. An accrued right is something that can be sued for immediately, as was the case in *Ertel Bieber & Co.* v. *Rio Tinto Co. Ld.*,[8] or something which will accrue by effluxion of time so that it can be sued for automatically, nothing further being required to be done under the contract before the right accrues. That was the ratio decidendi in *Schering Ld.* v. *Stockholms Enskilda Bank Aktiebolag*,[9] where a debt payable by instalments was held to be suspended and not abrogated. In this case clearly something remained to be done under the contract since no demand had been made. It would have been illegal to demand payment, as that would have involved communication with the enemy across the line of war. Therefore the contract must be wholly abrogated. [Reference was also made to *Joseph Constantine Steamship Line Ld.* v. *Imperial Smelting Corporation Ld.*[10]]

On May 15, 1948, there therefore ceased to be any contract of current account between the plaintiffs and the defendants at the Allenby Square branch, and accordingly there was no longer any money owing on current account by virtue of the contract, nor could there be any chose in action situate at the Allenby Square branch; and thereupon, by operation of law and not by contract, a new obligation arose, namely, an obligation on the defendants to refund to the plaintiffs the amount by which they had been unjustly enriched by reason of the frustrated contract. This obligation is imposed by English law and is in the nature of a simple debt. Where a contract has been frustrated and where, as a result of frustration, the consideration has failed wholly, the result is that a new obligation arises imposed by law to repay as money had and received the amount in respect of which the consideration has wholly failed. That obligation arises immediately the contract is frustrated: *Fibrosa Spolka Akcyjna* v. *Fairbairn Lawson Combe Barbour Ld.*,[11] which is similar to the present case. Here the contract had been frustrated and the defendants were holding in their branch at Allenby Square, Jerusalem, when the mandate ended, a sum of money and the consideration for retaining it, namely, the continuation of banking services which had become illegal, had wholly failed. Therefore, on the principle of the *Fibrosa* case,[11] the law immediately imposed on the defendants an obligation to pay to the plaintiffs a sum equal to the balance as money had and received. That is a new obligation, not arising out of the contract, but imposed by English law. It was in the nature of a simple debt, and therefore the obligation to repay is on the defendants and not on the Allenby Square branch, which is not a separate legal entity. The limitation on the place of payment at the Allenby Square branch was a term of the contract and only existed so long as the contract subsisted. The contract being frustrated, that limitation ceased to have any effect, and therefore the defendants cannot rely on it in support of their contention that any money payable is only payable at the branch in Israel. The obligation being dehors the contract is in no way linked with Palestine or Israeli law. (For the purposes of these questions it is common ground that Palestine and Israeli law are the same.)

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[7] [1946] A.C. 219, 240.

[8] [1918] A.C. 260.

[9] [1946] A.C. 219.

[10] [1942] A.C. 154; 57 T.L.R. 485; [1941] 2 All E.R. 165.

[11] [1943] A.C. 32; 58 T.L.R. 308; [1942] 2 All E.R. 122.

The Israeli custodian was not entitled to demand payment, and the defendants were under no obligation to pay him. The fact that they did so is nihil ad rem. The obligation being in the nature of a simple debt it was a chose in action and was capable of having, and did have, an ascertainable location. A simple debt is situate at the place of residence of the debtor: *English, Scottish and Australian Bank* v. *Commissioners of Inland Revenue*.[12] It makes no difference that the account was kept at the Allenby Square branch since the location of a simple debt cannot be affected by the place where the accounts are kept. They are mere evidence necessary to ascertain the amount of the debt: *Sutherland* v. *Administrator of German Property*.[13] The place of residence of a company is where it has its registered office or control: *Union Corporation Ld.* v. *Inland Revenue Commissioners*.[14] "Control" means "controlling central power" and not "local control." Therefore "residence" depends upon the place where central management rests. Ex concessis there is no central management and control at the defendants' branch at Allenby Square, Jerusalem, and therefore they cannot be resident there. It was suggested in *New York Life Assurance Co.* v. *Public Trustee* [15] that debts might be located wherever a company carried on business. The ratio decidendi of that case was that where a debt was payable at a branch and where a demand at that branch was a condition precedent to payment, then it was a debt situate where that branch was. In any event, that case was decided before *Union Corporation Ld.* v. *Inland Revenue Commissioners*,[16] and if there are any inconsistencies between the two decisions the latter must prevail. It is submitted, therefore, that the new obligation which arose on May 15, 1948, was immediately enforceable against the defendants at their registered office or principal place of residence, which is admittedly in London.

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[12] [1932] A.C. 238; 48 T.L.R. 170.

[13] [1934] 1 K.B. 423; 50 T.L.R. 107.

[14] [1952] W.N. 119; [1952] 1 T.L.R. 651; [1952] 1 All E.R. 646.

[15] [1924] 2 Ch. 101; 40 T.L.R. 430.

Even if Israeli law applies, and it is submitted that it does not, since its applicability must have disappeared with the contract which is frustrated, there would be nothing illegal from the point of view of Israeli law in a company in a neutral country, namely, the defendants, an English bank, paying a debt to an enemy of Israel, namely, the Arab Bank, outside Israel. Israeli legislation could not operate on this debt because, after frustration, there was only a simple debt which was situated in London, and Israeli legislation could not have any extraterritorial application. It is submitted that the judgment of Parker J. was wrong and that this appeal should be allowed.

Sir Hartley Shawcross Q.C., *Rodger Winn* and *Ian Warren* for the defendants. Neither the doctrine of abrogation nor the doctrine of unjust enrichment has ever been previously applied to the relationship of banker and customer on current account. Legislation and practice have always proceeded on the assumption that the liability of a banker on current account on the outbreak of war is merely suspended. By section 7 of the Trading with the Enemy Act, 1939, and S.R. & O. No. 1198 of 1939, made pursuant to the Act, it became illegal to make payments to an enemy, and the order specifically provided that any balance of current account of an enemy should be vested in the custodian.

It is fallacious to suppose that a contract of current account is wholly executory. On a customer entrusting money to a bank to hold on current account the relationship of debtor and creditor is at once created, the consideration being the bank's undertaking to keep the money and repay it when demanded. To that extent the contract is executed, and throughout the continuance of the contract the basic relationship remains that of debtor and creditor on money lent with certain added obligations: *Foley* v. *Hill*,[17] cited in *Joachimson* v. *Swiss Bank Corporation*[18]; Halsbury's Laws of England, vol. 1, p. 796, para. 1035. The right to demand payment of the balance is one of the superadded obligations in the contract. *Joachimson* v. *Swiss Bank Corporation*[18] is only

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[16] [1952] W.N. 119; [1952] 1 T.L.R. 651; [1952] 1 All E.R. 646.

[17] (1848) 2 H.L.C. 28.

[18] [1921] 3 K.B. 110.

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authority for the proposition that a balance on current account is not actionable before demand is made, and therefore that there is no accrued right of action until a demand is made. That case does not decide that there is no debt before demand. It is erroneous to say that a customer on a contract of current account has no accrued rights. He has at least a right to demand payment of the balance standing to his credit, and that is a right of property. The customer's rights are capable of being garnisheed or otherwise dealt with without notice, and they are also capable of being assigned. One can only garnishee on the basis that there is a debt owing and accruing: R.S.C., Ord. 45, r. 1; *Richardson* v. *Richardson and the National Bank of India Ld.*[19] The principle in *Richardson's* case [19] was followed by the Court of Appeal in *Bagley* v. *Winsome and National Provincial Bank Ld.*,[20] where it was held that a deposit account could not be garnisheed, but the court had no doubt that a current account could be garnisheed. There is no doubt that a balance on current account can be assigned: *Walker* v. *Bradford Old Bank* [21]; *In re Derbyshire.*[22]

A balance on current account is property which forms part of the estate of a deceased person, and it becomes payable to the personal representative on production of a grant: Halsbury's Laws of England, 2nd ed., vol. 1, p. 798. It is also an incident of a current account that it can be closed on death, lunacy or bankruptcy by operation of law or by act of parties. Thereupon the operations on the current account cease and the amount standing to the credit of the customer on balance struck at the end of the material day's business becomes due and payable at the branch where the account is kept. Death closes the account and puts an end to the further performance of the contract. It does not abrogate the contract: *Walker* v. *Bradford Old Bank.*[23] In those circumstances, since it is a debt for so many other purposes, it is artificial to say that the balance on current account is not a debt for the purposes of the effect of war on the contract. In principle there is no reason why the outbreak of war should not simply close the account as in the case of death or lunacy, leaving the balance owing and payable to the customer. It is not true to say that the provision of future banking services is the only consideration for the deposit of the money with the banker. The basic consideration is the promise to repay the loan. In the event of war the superadded obligations on the current account cease because they are personal to the customer, but the basic relationship of debtor and creditor remains.

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[19] [1927] P. 228; 43 T.L.R. 631.

[20] [1952] 2 Q.B. 236; [1952] 1 All E.R. 637.

[21] (1884) 12 Q.B.D. 511.

[22] [1906] 1 Ch. 135.

[23] 12 Q.B.D. 511.

The true doctrine applicable to the effect of war on a contract is not that it abrogates and destroys the contract itself, but that it prohibits the further performance of the contract other than the right to a liquidated sum of money: *Schering Ld.* v. *Stockholms Enskilda Bank Aktiebolag.*[24] Although future performance of the contract is prohibited, that part of it which has been performed up to the time of the declaration of war remains and is valid: *Ertel Bieber & Co.* v. *Rio Tinto Co. Ld.*[25] See also *Ottoman Bank* v. *Jebara.*[26] In determining the effect of war on a contract the criterion whether the contract is executed or executory is not an absolute one. A contract which is executory may include the right to a liquidated sum of money. If it does, that sum of money will be treated as a debt and will survive the war: McNair on Legal Effects of War, 2nd ed., p. 93: that passage was cited with approval by Lord Thankerton in *Schering's* case,[27] where there was a debt payable by instalments and the right to repayment was suspended during the war. See also *Ertel Bieber & Co.* v. *Rio Tinto Co. Ld.*[28] Many contracts which have been in part executory have been treated as merely suspended and not abrogated: *Seligman* v. *Eagle Insurance Co.*[29]; *Daimler Co. Ld.* v. *Continental Tyre and Rubber Co. (Great Britain) Ld.*[30]; *Hugh Stevenson & Sons Ld.* v. *Aktiengesellschaft für Carton-nagen-Industrie.*[31]

It has never before been doubted that a balance on current account is a debt, but, in any event, it is a liquidated sum of money which would be treated as a debt because it is immediately payable on demand. It is inaccurate to say that in the case of an accrued debt there is no more to be done under the contract and that, therefore, if the parties are separated by line of war there is no question of communication with the enemy. On the contrary, under such a contract the debtor's duty is to seek out his creditor and that would involve communications across the line of war. For the present purposes there is no distinction between a balance on current account and a debt payable by future instalments, as in *Schering Ld.* v. *Stockholms Enskilda Bank Aktiebolag.*[32] The discharge of the latter during the war would clearly involve intercourse with the enemy and thus enrich him, but nevertheless the debt is only suspended and not abrogated.

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[24] [1946] A.C. 219.
[25] [1918] A.C. 260.
[26] [1928] A.C. 269; 44 T.L.R. 525.
[27] [1946] A.C. 219, 240.
[28] [1918] A.C. 260.
[29] [1917] 1 Ch. 519.
[30] [1916] 2 A.C. 307; 32 T.L.R. 624.
[31] [1918] A.C. 239; 34 T.L.R. 206.
[32] [1946] A.C. 219.

The true reason why an obligation to pay a debt is only suspended and not abrogated is that a debt is a right of property and war does not destroy or abrogate such rights. The law does not confiscate the property of enemies: *Porter* v. *Freudenberg* [33]; *Ertel Bieber & Co.* v. *Rio Tinto Co. Ld.*[34] If a proprietary right is preserved then concomitants of that right must also be preserved. So in *Robson* v. *Premier Oil and Pipe Line Co. Ld.*,[35] where the question was whether during a state of war an alien enemy who was a shareholder in an English company was entitled to exercise his right to vote in the meetings of the company, it was held that that right was suspended during the war. In that case there was no suggestion that the right was abrogated, because a share is a right of property and the right to vote in general meetings is a concomitant of that right. A customer's interest in a current account is of a proprietary nature. It is at least a chose in action, for if it were not it could not be garnisheed or assigned. Therefore the rights in it are only suspended by war and not abrogated. The right to demand payment of the balance is a concomitant of the proprietary right in the balance and therefore it is suspended also.

The plaintiffs have sought to say that as the contract has been frustrated an obligation has arisen to repay a sum equal to the amount standing to their credit on the outbreak of war, and that that obligation is imposed by English law under the doctrine of unjust enrichment since it is a simple debt situate at the principal residence of the debtor. It is submitted that the incidents attaching to a contract, including the methods and consequences of its discharge, are normally to be determined by reference to the proper law of the contract: Halsbury's Laws of England, 2nd ed., vol. 6, p. 275, para. 330. The parties under this contract agreed irrevocably to submit themselves to the jurisdiction of the courts in Jerusalem, and the proper law of the contract is Israeli law. They are bound by the law by which they intended that they should be bound: *Lloyd* v. *Guibert*.[36] See also *Kleinwort Sons & Co.* v. *Ungarische Baumwolle Industrie Aktiengesellschaft* [37] and *Kahler* v. *Midland Bank*.[38] If a quasi-contractual relationship such as unjust enrichment arises after frustration of a contract the rights of the parties under that relationship must be decided by the proper law of the country where the unjust enrichment takes place: Dicey, Conflict of Laws, 6th ed., p. 754, rule 167. That law may be the lex locationis, the lex actionis or perhaps the lex fori, but it has never been suggested that residence has anything to do with the matter. If questions arising under a subsisting contract are to be decided by the proper law, and questions arising on frustration by the law of the place of the debtor's residence, the rights of the creditor may be altered fortuitously if the debtor happens to change his residence.

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[33] [1915] 1 K.B. 857; 31 T.L.R. 162.

[34] [1918] A.C. 260.

[35] [1915] 2 Ch. 124; 31 T.L.R. 420.

[36] (1865) L.R. 1 Q.B. 115.

[37] [1939] 2 K.B. 678; 55 T.L.R. 814; [1939] 3 All E.R. 38.

If, contrary to the defendants' submission, the present contract and all rights and obligations under it are to be considered as abrogated, it is submitted that that is only because the law of Israel treats the contract as illegal. But it is no part of the law of Israel or of England that a person who is by that law forbidden to perform a contract for the payment of money to an enemy alien is simultaneously placed under a present obligation to pay the money otherwise due on the contract as money had and received on the basis of unjust enrichment: *Reading* v. *Attorney-General*[39]; *Sinclair* v. *Brougham*[40]; *Boissevain* v. *Weil*.[41] The true view is that the system of law which abrogates the contract will not do more than replace the obligation to repay the debt with some other quasi-contractual obligation which is itself suspended during the war. The law would defeat its own object if it were to create an obligation which obliged the debtor to seek out the enemy creditor and pay him elsewhere during the war. In *Fibrosa Spolka Akcyjna* v. *Fairbairn Lawson Combe Barbour Ld.*[42] there was no question of enriching an enemy because the plaintiff was Polish and the Poles were not enemies but allies at the time when that action was brought and the matter was disposed of in the Court of Appeal.

Even if the last two submissions are wrong there still remains the question where this alleged liability is situate. If it is created by operation of law, and if its notional situation is in Israel, then the Israeli custodian was entitled to claim it. The plaintiffs' contention that the debt, being a simple debt, is situate at the principal residence of the debtor involves a confusion between residence for tax purposes and residence for the purposes of jurisdiction. The situs of a debt is clearly bound up with jurisdiction. A corporation may be said to reside for the purposes of suit wherever the company carries on business: *New York Life Assurance Co.* v. *Public Trustee*, *per* Lord Atkin.[43] That statement of the law has never been doubted. The plaintiffs submitted that that statement was obiter and wrong. It is submitted that although the plaintiffs may have a right to sue the defendants wherever they can find them, that does not affect the locality of the obligation for purposes of jurisdiction since the obligation, if it is created at all, arises out of or in consequence of a contract which was expressly stated to be governed by the law of Israel and by which the parties submitted themselves irrevocably to the jurisdiction of the courts in Jerusalem. Therefore there are special circumstances which tie the debt to a particular system of law and to a particular location: *New York Life Assurance Co.* v. *Public Trustee*.[43] In any event, it is submitted that the situs of a debt on current account, whether that account is closed or not, is in the country of the branch where the current account is kept; it was so held by the Privy Council in *Rex* v. *Lovitt* [44] and has never been doubted. If that is right, then this obligation, if it exists at all, is localized in Israel. If, as the defendants contend, the contract was, so far as the balance existing at the outbreak of war, only suspended, then there was a debt which under the Israeli trading with the enemy law was duly payable and was paid to the custodian in Israel. If, on the other hand, the contract was abrogated, as the plaintiffs submitted that it was, and there arose in its place an obligation to pay them a like amount on the principle of unjust enrichment and that obligation was also situate in Israel, then the defendants were obliged to pay it, and did pay it, to the custodian and were thereby discharged.

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[38] [1950] A.C. 24; 65 T.L.R. 663; [1949] 2 All E.R. 621.

[39] [1951] A.C. 507; [1951] 1 T.L.R. 480; [1951] 1 All E.R. 617.

[40] [1914] A.C. 398; 30 T.L.R. 315.

[41] [1950] A.C. 327; 66 T.L.R. (Pt. 1) 771; [1950] 1 All E.R. 728.

[42] [1943] A.C. 32.

Rodger Winn, following. The result of the outbreak of war between the States in which these two individual companies were properly situate was to prohibit the further performance of that part of their relationship which rested on special contract made between them, namely, the provision of banking services, which would have involved intercourse with the enemy. What remains, and what is not prohibited, is the obligation of the bankers to repay the customer the amount they received, that is, to account for and be a debtor in respect of that money. Money is deposited with a banker in the way of a loan, and that transaction carries with it an obligation to repay. Therefore, on the outbreak of war there was already a pre-existing obligation to account. Where there is already an existing obligation there is no need for the law to impute or create one, as the plaintiffs submitted, since the law only imputes or creates a fictitious obligation to make good a lacuna. It is said by the plaintiffs that no right has accrued until demand is made. Although the matter appears to be devoid of authority, it is submitted that if A is entitled to receive something from B as soon as he asks for it, then A has an accrued right against B. If nothing remains to be done before his right can be effectively enforced other than the making of the demand, which depends on his own choice and volition, it is submitted that in reality, in the ordinary use of language and in law, an immediately enforceable right exists. It is therefore a false distinction to say that a debt payable on demand is not immediately payable if it would be payable immediately after demand and the customer in normal circumstances can make a demand whenever he chooses. [Reference was made to *Metropolitan Water Board* v. *Dick, Kerr & Co.*,[45] *Taylor* v. *Caldwell*[46] and *Fibrosa Spolka Akcyjna* v. *Fairbairn Lawson Combe Barbour Ld.*[47] in discussing the doctrine of frustration.]

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[43] [1924] 2 Ch. 101, 120.

[44] [1912] A.C. 212.

Sir Andrew Clark Q.C., in reply. It is a pure question of fact whether banking practice has hitherto treated contracts of current account as suspended and not as abrogated in such circumstances as the present, and in any event that has not been pleaded. Assuming that what the defendants contended in that respect could be established, it would mean that it was an implied term of a contract of current account that it could be suspended on the outbreak of war. The law will not give effect to an express term of such a character, and neither will it give effect to such an implied term: *Ertel Bieber & Co.* v. *Rio Tinto Co. Ld.*[48] *Robson* v. *Premier Oil and Pipe Line Co. Ld.*[49] is not applicable to a contract of current account. The customer is not a shareholder of the bank and he has no proprietary right in its capital. He has merely lent money which forms part of the general assets of the bank. If there is no proprietary right there can be no concomitant. A demand is a requirement of a contract and is based on the contractual relationship. Therefore frustration which puts an end to the contract also puts an end to the necessity for a demand, and no enforceable debt could have accrued. A

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[45] [1918] A.C. 119; 34 T.L.R. 113.

[46] (1863) 3 B. & S. 826.

[47] [1943] A.C. 32.

[48] [1918] A.C. 260.

[49] [1915] 2 Ch. 124.

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right to demand payment without a demand cannot be preserved as there was never any right under the contract to demand payment without a demand. Any right to demand payment can only arise by operation of law on the principle in the *Fibrosa* case.[50] If, as Mr. Rodger Winn submitted, on the advance of money by way of loan there is an inherent obligation on the banker to repay it, it is the ordinary relationship of debtor and creditor, which is an obligation to seek out the debtor and repay him—the same obligation which is imposed by law on the principle of the *Fibrosa* case.[50] Whichever view is taken, a debt is owing by the bank to the customer to which all the normal incidents of a debt attach and on which there are no restrictions.

This is a simple debt and therefore it is situate at the residence of the debtor irrespective of what is the proper law of the contract. *Rex* v. *Lovitt*[51] only decides that, where there is an express limitation that payment can only be made at one branch, the debt is only payable at that place in the first instance. The mere fact that a company happens to have a branch where the debt could be situate does not make that branch the "residence" of the company within the meaning of the rule that a debt is located where the debtor resides. The company's residence is its principal place of business. Whether a company can have two residences for the purpose of location of a debt, as it has for the purposes of tax, need not be considered, but it is clear that it cannot have residences all over the world wherever it happens to be carrying on business. The residence for the purpose of location of a debt must be at least as stringent as the residence for taxation purposes, and, indeed, more stringent, and it is submitted that for that purpose a company can have only one residence. It is sufficient, however, for this case, to decide that the mere fact that the company happens to have a branch does not make that branch its "residence" within the meaning of the above-stated rule; otherwise, as was suggested in *Guaranty Trust Co. of New York* v. *Hannay & Co.*,[52] a debt might be located in thirty different countries and no one would ever find the debtor. The true rule is that laid down in *English, Scottish and Australian Bank Ld.* v. *Inland Revenue Commissioners.*[53] The residence of a company is found by analogy to the individual, and on that analogy there has never been any difficulty in ascertaining where the residence of a company is, as there would be if it were true that a company could reside wherever it was amenable to jurisdiction.

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[50] [1943] A.C. 32.

[51] [1912] A.C. 212.

[52] [1915] 2 K.B. 536.

[53] [1932] A.C. 238.

A contract of current account cannot be assigned before demand is made. *Walker* v. *Bradford Old Bank*,[54] which decided that such a balance was assignable before demand, was decided before the decision in *Joachimson* v. *Swiss Bank Corporation*,[55] and, it is submitted, was wrongly decided. In any event, it was a decision of the Divisional Court and is not binding on this court. It is submitted that the garnishee cases are anomalous exceptions, but, even if not, those cases would only effect the argument for the plaintiffs if they showed that a demand was not necessary before the balance was payable. It is accepted that a current account is closed by death, but it is submitted that that result is an implied term of the contract between the banker and the customer. The contract of current account remains and there is an implied term in the contract that the money on account shall only be paid at the branch. That does not apply in the case of war, because the contractual relationship is brought to an end and the parties to the contract cannot by private bargain keep alive a term of the contract: *Ertel Bieber & Co.* v. *Rio Tinto Co. Ld.*[56]

It is admitted that the contract is not abrogated ab initio, but it is abrogated as to the future except for rights which have accrued. The whole contract is dissolved and not merely some terms of it. It is not possible to have abrogation and suspension at one and the same time. Only the right to sue for a liquidated sum of money is suspended, and that must be a present obligation to pay. It is inaccurate to say, as does Sir Arnold McNair in Legal Effects of War, 2nd ed., p. 93, that a contract to pay money is only suspended. With regard to the submissions for the defendants as to the proper law, it is agreed that whether or not rights have accrued under a contract must be decided by the proper law, but once those rights have been determined the proper law ceases to have any effect. It does not affect this case since the proper law of the contract is Israeli law, which is the same as the common law of England. If that be wrong, then it is submitted that the obligation to repay this money arises under English law, since (a) it is an equitable remedy in personam and the courts of England will enforce it against a person resident in England. The passage in the 6th ed. of Dicey's Conflict of Laws, at p. 754, is a new rule which was not contained in any of the editions edited by Dicey himself, and it is not supported by the authorities. Alternatively, it is submitted (b) that this is a

[54] 12 Q.B.D. 511.

[55] [1921] 3 K.B. 110.

[56] [1918] A.C. 260.

procedural remedy rather than a right. The rights of parties are determined by the proper law, but the question whether there is a remedy must be determined by English law: Dicey, Conflict of Laws, 6th ed., p. 859. It would not be illegal for the defendants to pay to the plaintiffs a sum equal to that standing to their credit on the current account. It is only the English common law which must be applied. Legislation cannot alter the common law unless it expressly states that it does so. Once it is established that the contract is frustrated by reason of the fact that the consideration has wholly failed, if one party to the contract has no accrued right to recover his money the law merely puts him in the same position as he would have been in if he had had such an accrued right. If the party to whom the money is due is an enemy, then the payment is suspended during the war. If the debtor is resident not in England but in some neutral country the right would be enforceable because there is nothing illegal in English law in a neutral paying an enemy. *Hugh Stevenson & Sons Ld.* v. *Aktiengesellschaft für Carton-nagen-Industrie* [57] is in the plaintiffs' favour because it was there held that a partnership is dissolved on the outbreak of war and the right to be paid a share of the assets arises out of the Partnership Act, 1890, and not out of the contract.

Cur. adv. vult.

May 21. SINGLETON L.J. On the hearing before Parker J. many questions were raised and a considerable amount of evidence was given. On the hearing of the appeal the plaintiffs accepted in general the findings of fact of the judge and, as I shall show, the question with which this court is faced is one of law. [His Lordship stated the facts and continued:] Before Parker J. the plaintiffs contended that the defendants were in breach of their contract in that it was said there had been demand for payment of the amount standing to the credit of the current account before the termination of the mandate. The judge found on the facts that no demand was made on the defendants for the balance of the plaintiffs' account or for any sum the non-compliance with which could be said to be a breach, and he held that before the termination of the mandate there had been no breach of contract on the part of the defendants.

In this court Sir Andrew Clark for the plaintiffs accepted the finding of fact of the judge that there was no breach by the defendants of their obligations under the contract before the termination of the mandate. As from that time—or a little earlier—fighting had broken out in Jerusalem between Jews and Arabs, and the offices of the plaintiffs and defendants were virtually in the front line. As from the setting up of a provisional government and Council of the State of Israel there was open warfare between that State and the Arabs. Fairly soon there became, more or less stabilized, a line dividing the opposing forces. The office of the plaintiffs was on the Arab side of the line, and the defendants' Allenby Square office was on the Jewish side.

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[57] [1918] A.C. 239.

The defendants' Allenby Square office was occupied by Jewish troops a short time before the expiration of the mandate, from which it is to be assumed that the defendants had moved. No point is taken upon this, and the case which was put to this court was that until the British mandate expired there was open at the defendants' Allenby Square branch a current account in the name of the plaintiffs, and the question to be determined was as to the amount standing to the credit of the plaintiffs on the date of the expiration of the mandate. As Sir Andrew Clark pointed out, it would not have been possible for the plaintiffs to make a demand at the defendants' branch on or after May 15; nor would it have been possible for the defendants in Israel to pay the plaintiffs on the other side of the line, for Israel was at war with the Arabs across the line, and, moreover, the Government of Israel passed a law making it illegal for any person in Israel to make a payment outside without government permission.

There was correspondence between the head offices of the respective banks, and on November 24, 1948, the general manager of the defendants wrote to the general manager of the Arab Bank at Cairo saying that it was regretted that they were advised that the position was: "An account at our Allenby Square branch "constitutes a debt due from our Allenby Square branch which "is legally payable only at or by transfer from that branch. The "Jewish authorities who are in de facto control of the area in "which our branch is situated will not permit transfer or payment "of balances outside territory occupied by them, without their "prior authority. Being therefore constrained by reason of force "majeure we are unable without such prior authority to pay your "balance as requested by you"; and an offer was made to approach the Jewish authorities. Nothing came of this, and the writ was issued on October 9, 1950.

In February, 1951, the defendants paid to the Israeli Custodian of Enemy Property, at his request, a sum purporting to represent the balance at the branch on the expiration of the mandate. The plaintiffs did not know of this until some considerable time later. I do not know why the defendants did not tell the plaintiffs, except that Sir Hartley Shawcross said that they were advised not to do so.

The case put forward by Sir Andrew Clark, on behalf of the Arab Bank, was that the contract was frustrated, that the contract of current account went, and that there arose an obligation imposed by law on the defendants to pay the plaintiffs the amount standing to the plaintiffs' credit.

It is necessary to consider what are the implications which arise from the relationship of banker and customer on a current account. In *Joachimson* v. *Swiss Bank Corporation*[1] it was held: "Where money is standing to the credit of a customer on "current account with a banker, in the absence of a special agree-"ment a demand by the customer is a necessary ingredient in the "cause of action against the banker for money lent." Roche J. had held in the court of first instance: "The debt owing by "a banker to his customer was in the same position in this respect "as a debt owing by any other debtor, and could be sued for "without any previous demand; that the evidence given by "bankers to show a custom differentiating the case of bankers "from that of other debtors failed to prove any such custom; and "he gave judgment for the plaintiffs for the amount claimed." It was held by this court, all the Lords Justices agreeing, that a demand was necessary. Bankes and Warrington L.JJ. were inclined to the view that a writ was sufficient demand, but the case should not be regarded as an authority for that proposition. The judgment of Atkin L.J. set out the position as between banker and customer clearly. He said[2]: "This case raises the question "whether the customer of a bank may sue the banker for the "balance standing to the credit of his current account without "making a previous demand upon the banker for payment. It "is unnecessary to recapitulate the circumstances which raise "this issue in this case. It is sufficient to state that upon the "hearing of a summons for particulars on March 16, 1920, the "defendants undertook to limit their causes of action to those "arising on or before August 1, 1914, and that at that date no "demand for the balance had been made to the bank.

"The question seems to turn upon the terms of the contract "made between banker and customer in ordinary course of "business when a current account is opened by the bank. It is

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[1] [1921] 3 K.B. 110; 37 T.L.R. 534.

[2] [1921] 3 K.B. 110, 126.

"said on the one hand that it is a simple contract of loan; it "is admitted that there is added, or superadded, an obligation "of the bank to honour the customer's drafts to any amount "not exceeding the credit balance at any material time; but it "is contended that this added obligation does not affect the main "contract. The bank has borrowed the money and is under the "ordinary obligation of a borrower to repay. The lender can "sue for his debt whenever he pleases. I am unable to accept "this contention. I think that there is only one contract made "between the bank and its customer. The terms of that contract "involve obligations on both sides and require careful statement. "They appear upon consideration to include the following "provisions. The bank undertakes to receive money and to "collect bills for its customer's account. The proceeds so "received are not to be held in trust for the customer, but the "bank borrows the proceeds and undertakes to repay them. "The promise to repay is to repay at the branch of the bank "where the account is kept, and during banking hours. It "includes a promise to repay any part of the amount due against "the written order of the customer addressed to the bank at "the branch, and as such written orders may be outstanding in "the ordinary course of business for two or three days, it is a "term of the contract that the bank will not cease to do business "with the customer except upon reasonable notice. The "customer on his part undertakes to exercise reasonable care "in executing his written orders so as not to mislead the bank "or to facilitate forgery. I think it is necessarily a term of "such contract that the bank is not liable to pay the customer "the full amount of his balance until he demands payment from "the bank at the branch at which the current account is kept. "Whether he must demand it in writing it is not necessary now "to determine. The result I have mentioned seems to follow "from the ordinary relations of banker and customer, but if "it were necessary to fall back upon the course of business and "the custom of bankers, I think that it was clearly established "by undisputed evidence in this case that bankers never do "make a payment to a customer in respect of a current account "except upon demand."

Atkin L.J. added[3]: "The question appears to me to be "in every case, did the parties in fact intend to make the "demand a term of the contract? If they did, effect will be

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[3] Ibid. 129.

"given to their contract, whether it be a direct promise to pay "or a collateral promise, though in seeking to ascertain their "intention the nature of the contract may be material. In the "case of such a contract as this, if I have correctly stated the "manifold terms of it, it appears to me that the parties must "have intended that the money handed to the banker is only "payable after a demand. The nature of the contract negatives "the duty of the debtor to find out his creditor and pay him his "debt. If such a duty existed and were performed, the creditor "might be ruined by reason of outstanding cheques being dishonoured. Moreover, payment can only be due, as it appears "to me, at the branch where the account is kept, and where "the precise liabilities are known. And if this is so, I "apprehend that demand at the place where alone the money "is payable must be necessary. A decision to the contrary would "subvert banking business. I am glad to think that, so far "as I can ascertain, the decisions in the American courts are "uniformly to the same effect as our present judgment."

In *Walker* v. *Bradford Old Bank*[4] the court had to consider on a case stated the position which arose after the death of a customer who had assigned all moneys then or thereafter standing to his credit at the bank. It was held that the balance at the time of death was a debt or legal chose in action within the meaning of section 25 (6) of the Judicature Act, 1873, and A. L. Smith J., who gave the judgment of the court said[5]: "In the present case what has been assigned, to use the words "of the indenture of assignment, is 'All moneys now or hereafter "'to be standing to the credit of the said Robert Vincent "'Reynolds' (the assignor) 'in the books of or at the said bank "'at Bradford, aforesaid, called the Bradford Old Bank, Ld.' "It was conceded in argument by the defendants that the "moneys thereafter paid into the bank to the credit of the "assignor were capable of being the subject-matter of contract: "*Holroyd* v. *Marshall*,[6] and I am of opinion that before and at "the date of the assignment, and as long as the relation of "customer and banker continued between the assignor and "the bank, the ordinary relation of debtor and creditor existed "between them (with the superadded obligation on the bank's "part to honour the assignor's cheques, which is immaterial "to the point under consideration), and that consequently there "existed a contract on the bank's part to pay over on demand to

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[4] 12 Q.B.D. 511.

[5] Ibid. 516.

[6] (1862) 10 H.L.C. 191.

"the assignor all moneys then or thereafter standing to his "credit. It seems to me, therefore, in this case, that at the "date of the assignment there was an accruing debt arising "out of contract, and consequently that this point also fails the "defendants."

Clearly the relationship of debtor and creditor exists between banker and customer on a current account, though the right to sue does not arise in the ordinary case unless there has been a demand, and a demand at the branch at which the current account is situate. The relationship, so long as it exists, involves duties and obligations on both sides, and, consequently, intercourse between the customer and someone at the branch at which the account is kept.

The case put forward by the plaintiffs on the appeal was that the contract was an executory contract and that it was frustrated by war, the defendants' Allenby Square branch being on one side of what was spoken of as the line of war, and the plaintiffs being on the other side. It was said that as from May 15, 1948, there ceased to be any contract of current account between the plaintiffs and the defendants at the Allenby Square branch, and there was therefore no longer any money owing on current account, but that by operation of law a new obligation arose, namely, an obligation upon the defendants to refund the amount by which they had been unjustly enriched by frustration. That obligation, it was said, was in the nature of a simple debt, situate at the place of residence of the debtor, that is, at their head office in London.

It was common ground that there is no difference between English, Palestinian, or Israeli law for the purposes of this appeal.

In support of their claim the plaintiffs relied on the speeches of their Lordships in *Fibrosa Spolka Akcyjna* v. *Fairbairn Lawson Combe Barbour Ld.*[7] Lord Simon L.C. said[8]: "The principle "is that where supervening events, not due to the default of either "party, render the performance of a contract indefinitely impos- "sible, and there is no undertaking to be bound in any event, "frustration ensues, even though the parties may have expressly "provided for the case of a limited interruption. As MacKinnon "L.J. points out,[9] the unsoundness of the contrary view is implicit "in *Jackson* v. *Union Marine Insurance Co. Ld.*,[10] for the charter- "party in that case contained an exception of perils of the sea,[11] "but none the less the contract was held to have been terminated

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[7] [1943] A.C. 32; 58 T.L.R. 308; [1942] 2 All E.R. 122.

[8] [1943] A.C. 32, 40, 41.

[9] [1942] 1 K.B. 12, 26.

[10] (1874) L.R. 10 C.P. 125.

[11] L.R. 8 C.P. 572, 584.

"and the adventure to have been frustrated by the long delay due "to the stranding of the ship. The situation arising from the "outbreak of the present war, so far as this country, Germany "and Poland are concerned, makes applicable Lush J.'s well-"known observation in *Geipel* v. *Smith* [12]: 'A state of war' (in "that case the Franco-German war of 1870) 'must be presumed "'to be likely to continue so long and so to disturb the commerce "'of merchants as to defeat and destroy the object of a com-"'mercial adventure like this.' There is a further reason for "saying that this subsidiary contention of the appellants must "fail, namely, that, while this country is at war with Germany "and Germany is occupying Gdynia, a British subject such as "the respondents could not lawfully make arrangements to deliver "c.i.f. Gdynia, and, therefore, the contract could not be further "performed because of supervening illegality."

Lord Atkin said [13]: "My Lords, for the reasons given by the "Lord Chancellor I agree that the appellant fails on all his points "except that arising out of the frustration of the contract. I "have no doubt that the contract in this case came to an end "before the time for complete performance had arrived by reason "of the arising of a state of war which caused an indefinite delay "not contemplated by the parties, and eventually the legal impos-"sibility of delivering the goods at a port occupied by the enemy. "In other words, to use a short phrase of frequent occurrence "since the beginning of the last war, the commercial adventure "was frustrated. The legal effects of 'frustration' are not in "dispute. They were not determined for the first time either "by the cases which arose on the postponement of the coronation "of Edward VII, or by reason of the last war. It is very neces-"sary to remember that, as pointed out by Vaughan Williams L.J. "in *Krell* v. *Henry*,[14] the principle of law is the same whether the "performance of the contract becomes impossible by the cessation "of existence of a thing which is the subject of the contract (an "obligation de certo corpore) or by the cessation or non-existence "of an express condition or state of things going to the root of the "contract and essential to its performance, and it is well settled "that when a contract which is still executory on one or both "sides is subject to frustration the law is that when the event "happens the parties are excused from further performance, but "have to give effect to rights under the contract already accrued "before the happening of the event."

[12] (1872) L.R. 7 Q.B. 404, 414.

[13] [1943] A.C. 32, 50.

[14] [1903] 2 K.B. 740, 748.

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Lord Macmillan said [15]: "Owing to circumstances arising out "of the present hostilities the contract has become impossible of "fulfilment according to its terms. Neither party is to blame."

Lord Wright said [16]: "My Lords, the claim in the action was "to recover a prepayment of £1,000 made on account of the price "under a contract which had been frustrated. The claim was for "money paid for a consideration which had failed. It is clear "that any civilized system of law is bound to provide remedies "for cases of what has been called unjust enrichment or unjust "benefit, that is to prevent a man from retaining the money of "or some benefit derived from another which it is against conscience that he should keep. Such remedies in English law "are generically different from remedies in contract or in tort, "and are now recognized to fall within a third category of the "common law which has been called quasi-contract or restitution.

"The root idea was stated by three Lords of Appeal, Lord "Shaw, Lord Sumner and Lord Carson, in *R. E. Jones Ld.* v. "*Waring & Gillow Ld.*,[17] which dealt with a particular species "of the category, namely, money paid under a mistake of fact. "Lord Sumner referring to *Kelly* v. *Solari*,[18] where money had "been paid by an insurance company under the mistaken impression that it was due to an executrix under a policy which had "in fact been cancelled, said: 'There was no real intention on "'the company's part to enrich her.' Payment under a mistake "of fact is only one head of this category of the law. Another "class is where, as in this case, there is prepayment on account "of money to be paid as consideration for the performance of a "contract which in the event becomes abortive and is not performed, so that the money never becomes due. There was in "such circumstances no intention to enrich the payee. This is "the class of claims for the recovery of money paid for a consideration which has failed. Such causes of action have long "been familiar and were assumed to be common-place by Holt C.J. "in *Holmes* v. *Hall* [19] in 1704. Holt C.J. was there concerned "only about the proper form of action and took the cause of the "action as beyond question. He said: 'If A give money to B "'to pay to C upon C's giving writings, etc., and C will not do "'it, indebit will lie for A against B for so much money received "'to his use. And many such actions have been maintained for "'earnests in bargains, when the bargainor would not perform,

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[15] [1943] A.C. 32, 60.

[16] Ibid. 61.

[17] [1926] A.C. 670, 696.

[18] (1841) 9 M. & W. 54.

[19] (1704) Holt K.B. 36.

" 'and for premiums for insurance, when the ship, etc., did not " 'go the voyage.' The Chief Justice is there using earnest as " meaning a prepayment on account of the price, not in the " modern sense of an irrevocable payment to bind the bargain, " and he is recognizing that the indebitatus assumpsit had by that " time been accepted as the appropriate form of action in place " of the procedure which had been used in earlier times to enforce " these claims such as debt, account or case.

" By 1760 actions for money had and received had increased " in number and variety. Lord Mansfield C.J., in a familiar " passage in *Moses* v. *Macferlan*,[20] sought to rationalize the " action for money had and received, and illustrated it by some " typical instances. 'It lies,' he said, 'for money paid by " 'mistake; or upon a consideration which happens to fail; or " 'for money got through imposition (express, or implied); or " 'extortion; or oppression; or an undue advantage taken of the " 'plaintiff's situation, contrary to laws made for the protection " 'of persons under those circumstances. In one word, the gist " 'of this kind of action is, that the defendant, upon the circum- " 'stances of the case, is obliged by the ties of natural justice " 'and equity to refund the money.' Lord Mansfield prefaced " this pronouncement by observations which are to be noted.[21] " 'If the defendant be under an obligation from the ties of " 'natural justice, to refund; the law implies a debt and gives " 'this action (sc. indebitatus assumpsit) founded in the equity " 'of the plaintiff's case, as it were, upon a contract (" quasi ex " ' " contractu " as the Roman law expresses it).' Lord Mans- " field does not say that the law implies a promise. The law " implies a debt or obligation which is a different thing. In " fact, he denies that there is a contract; the obligation is as " efficacious as if it were upon a contract. The obligation is a " creation of the law, just as much as an obligation in tort. The " obligation belongs to a third class, distinct from either contract " or tort, though it resembles contract rather than tort." And again Lord Wright said[22]: " The gist of the action is a debt or " obligation implied, or, more accurately, imposed, by law in " much the same way as the law enforces as a debt the obliga- " tion to pay a statutory or customary impost."

Lord Wright cited the views of Lord Haldane in *Royal Bank of Canada* v. *Reg.*[23] as follows[24]: " It is a well-established

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[20] (1760) 2 Burr. 1005, 1012.

[21] Ibid. 1008.

[22] [1943] A.C. 32, 63.

[23] [1913] A.C. 283, 296; 29 T.L.R. 239.

[24] [1943] A.C. 32, 65.

"principle of the English common law that when money has "been received by one person which in justice and equity belongs "to another, under circumstances which render the receipt of it "a receipt by the defendant to the use of the plaintiff, the latter "may recover as for money had and received to his use."

In the same case, Lord Roche used these words [25]: "I have "no doubt that this case is one of frustration of the contract and "falls within the doctrine applicable to such cases. An alterna-"tive case made by the appellants that the contract was merely "suspended and while suspended was repudiated by the respon-"dents is, I think, without foundation."

Lord Porter said [26]: "What has been said is that the doctrine "of frustration depends on the implication of an implied term. "Reasonable persons, it is said, would not have had in mind the "event which befell, but if they had they would have unhesi-"tatingly said: 'In that event all further obligation of per-"'formance on either side is at an end.' So far and no further "it is acknowledged that the law of this country has gone, but, it "is urged, a system of jurisprudence which is astute enough to "devise such a term is capable of adding to it the proviso that "in such a case some equitable proportion of any sum paid in "advance shall be recoverable when the contract becomes "impossible of performance."

In *Schering Ld.* v. *Stockholms Enskilda Bank Aktiebolag* [27] the chief question was whether the contract was to be regarded as an executory or as an executed contract, and the House of Lords, by a majority, decided that "on the true "construction of the documents, the respondent bank having "fully performed their obligations to the German company "before the outbreak of war, nothing remained to be done under "the contract, which was one between an English company and "a neutral, but to discharge an accrued debt by instalments; "accordingly, since war does not abrogate or discharge a debt "incurred before the declaration, the obligation to pay and the "right to recover were only suspended."

Lord Thankerton said [28]: "My Lords, we had a very full "citation of authorities and the able arguments of counsel on "both sides have been very helpful, but I find little need to go "beyond the speeches of Lord Dunedin and Lord Sumner in "the well-known case of *Ertel Bieber & Co.* v. *Rio Tinto Co.*

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[25] [1943] A.C. 32, 73.

[26] Ibid. 77.

[27] [1946] A.C. 219; 62 T.L.R. 122; [1946] 1 All E.R. 36.

[28] [1946] A.C. 219, 237.

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"*Ld.*,[29] in which the earlier authorities are reviewed. Lord "Dunedin says[30]: 'From these cases I draw the conclusion that "'upon the ground of public policy the continued existence of "'contractual relation between subjects and alien enemies or "'persons voluntarily residing in the enemy country which "'(1) gives opportunities for the conveyance of information "'which may hurt the conduct of the war, or (2) may tend to "'increase the resources of the enemy or cripple the resources "'of the King's subjects, is obnoxious and prohibited by our "'law.' In his judgment Lord Greene M.R. appears to draw "a distinction, on matter of principle, between contracts "between a British subject and an alien enemy, and a contract "between a British subject and a neutral. In my opinion, the "paramount consideration of public policy in either case is the "unhampered carrying on of the war, without harmful inter-"course with the enemy, or economic benefit to the enemy or "economic disadvantage to this country. But the applicability "of the principle is likely to be rare in the case of contracts "between a British subject and a neutral, or not so obvious as in "the case of a contract between a British subject and an enemy. "As regards the consequence of this contravention of public "policy, I am of opinion that the courts have no choice between "the abrogation and suspension of the contract, abrogation being "the necessary consequence. I agree with Lord Sumner's "statement on this point in *Ertel Bieber & Co.* v. *Rio Tinto Co.* "*Ld.*[31]: 'My Lords, if upon public grounds on the outbreak of "'war the law interferes with private executory contracts by "'dissolving them, how can it be open to a subject for his "'private advantage to withdraw his contract from the operation "'of the law and to claim to do what the law rejects, merely to "'suspend where the law dissolves? The prohibition, which "'arises at common law on the outbreak of war, has for this "'purpose the effect of a statute. The choice between sus-"'pending and discharging the contract on the outbreak of war "'was quite deliberately made, and if occasionally the contract "'is said to be only suspended, or a court refuses to dispose of "'a case on the ground of dissolution alone, this only brings into "'relief the fact that by an overwhelming preponderance of "'authority such trading contracts have been held to be "'dissolved on the outbreak of war. An appearance of authority

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[29] [1918] A.C. 260; 34 T.L.R. 208.

[30] [1918] A.C. 260, 274.

[31] Ibid. 286.

" 'to the contrary is sometimes found to be in truth a misreading " 'of the language of a decision.'

"After reference,[32] by way of illustration, to the language "of the Earl of Halsbury L.C. in *Janson* v. *Driefontein Consolidated Mines Ld.*,[33] Lord Sumner proceeded: 'There can be " 'no doubt that the matter must have been considered. To " 'many people suspension seems to have much to recommend " 'it. Freedom of contract is challenged less; the sacrosanctity " 'of commerce is respected more. The courts could not have " 'adopted the rule of dissolution unless they had reasoned " 'that suspension would be inconsistent with this principle of " 'the law of contract. I will quote the language of Willes J. " 'in *Esposito's* case.[34] "In all ordinary cases, the more " ' "convenient course for both parties seems to be that both " ' "should be at once absolved, so that each, on becoming aware " ' "of the fact of a war, the end of which cannot be foreseen, " ' "making the voyage or the shipment presumably illegal for " ' "an indefinite period, may at once be at liberty to engage " ' "in another adventure without waiting for the bare possibility " ' "of the war coming to an end in sufficient time to allow " ' "of the contract being fulfilled, or some other opportunity " ' "of lawfully performing the contract perchance arising. " ' "The law upon this subject was doubtless made, according " ' "to the well-known rule, to meet cases of ordinary " ' "occurrence." To his mind I think it is clear that the " 'rule was one made to provide certainty at the outbreak of " 'war, where in itself everything is uncertain; that it was one " 'made to apply generally, although taking its form from the " 'needs of ordinary cases; and that, for the purpose of applying " 'it, the case must be looked at as things stood when war " 'broke out, and not as they were ascertained to be or as they " 'ultimately happened during the interval before the trial of " 'the action.'

"The contracts which fall under this principle of public "policy are clearly contracts the performance or further performance of which after the outbreak of war may involve the "consequences which the principle, by its application, seeks to "avoid, but it is equally clear that there are certain well-established exceptions to the contracts thus broadly defined. "I may quote the speech of Lord Dunedin in the case of

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[32] [1918] A.C. 260, 287.

[33] [1902] A.C. 484, 493; 18 T.L.R. 796.

[34] (1857) 7 E. & B. 763, 792.

"*Ertel Bieber & Co.* v. *Rio Tinto Co. Ld.*[35] 'Now *Esposito* v. "'*Bowden*[36] has been cited by learned judges in many cases, "'and no doubt has ever been cast on its authority. Nor has "'it ever been taken as dealing with any particular contract, "'but it has been held as dealing with contracts in general. So "'far as *Janson's* case[37] is concerned, the only matter there "'decided was that there must be an actual state of war to "'determine a contract; a mere imminence of war is not enough. "'It is true that Lord Halsbury's dictum, if applied as an "'universal proposition, would be counter to the doctrine of "'*Esposito* v. *Bowden*.[38] But I am satisfied not only that "'the dictum was obiter and not binding, but that Lord "'Halsbury was not dealing with or thinking of executory con- "'tracts, but of contracts under which rights had already "'accrued. There is indeed no such general proposition as "'that a state of war avoids all contracts between subjects and "'enemies. Accrued rights are not affected though the right "'of suing in respect thereof is suspended. Further, there are "'certain contracts, particularly those which are really the "'concomitants of rights of property, which even so far as "'executory are not abrogated. Such as, for instance, the con- "'tract between landlord and tenant, of which an example may "'be found in the recent case of *Halsey* v. *Lowenfeld*.[39] In "'other words, the executory contract which is abrogated must "'either involve intercourse, or its continued existence must be "'in some other way against public policy as that has been "'laid down in decided cases.' In the case of the established "exceptions to which Lord Dunedin refers the necessity for "intercourse with an enemy is obviated by the postponement of "the right of action, and non-forfeiture of an existing right "supersedes any question of an immediate or future benefit of "the enemy."

Lord Thankerton approved words of Sir Arnold McNair, which appear to me to be of great importance and to be helpful in the solution of this case. Lord Thankerton said[40]: "I am "inclined to agree with Sir Arnold McNair's suggestion (Legal "Effects of War, 2nd ed. at p. 93), 'that the distinction between "'"executed" and "executory contracts" may not be very "'helpful in this connexion and that it may be found safer to

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[35] [1918] A.C. 260, 269.

[36] 7 E. & B. 763.

[37] [1902] A.C. 484, 493.

[38] 7 E. & B. 763.

[39] [1916] 2 K.B. 707; 32 T.L.R. 709.

[40] [1946] A.C. 219, 240.

" 'say that . . . the effect of the outbreak of war upon contracts " 'legally affected by it is to abrogate or destroy any subsisting " 'right to further performance other than the right to the pay- " 'ment of a liquidated sum of money, which will be treated " 'as a debt and will survive the outbreak of war.' "

In a later passage Lord Thankerton said [41]: "It is important "to make clear that the principle of abrogation does not involve "destruction of the contract so far as already performed. That "which is abrogated is the further performance of the contract, "as from the outbreak of war; or, as Lord Dunedin expresses it "in the passage already quoted, the continued existence of the "contractual relationship is prohibited." I draw attention to the fact that on p. 241 the citation from Lord Dunedin is not quite accurately reported.

Lord Porter in the *Schering* case said [42]: "My Lords, I "have found the solution of this case a matter of difficulty, "primarily I think because of the complexity of the arrangements "between the parties and the necessity of safeguarding the rights "of neutrals whilst not diminishing the ability of this country "to preserve its interests in time of war. It is, no doubt, "generally true that the further performance of contracts made "before the outbreak of war and not fully performed on either "side is prohibited as contrary to public policy provided that "such performance involves intercourse with an enemy or "benefits him. For the sake of brevity I speak of this result "as abrogation of the contract though the contract itself is not "abrogated, but further performance alone forbidden. There "are however exceptions and limitations upon this doctrine. So "far at any rate as concerns benefit to the enemy, the further "performance of contracts which have been completely per- "formed on one side and in which all that remains is payment "by the other are suspended, not dissolved, and in the same "category are to be placed certain contracts particularly those "which are really concomitants of the rights of property though "still executory: see per Lord Dunedin in *Ertel Bieber & Co.* "v. *Rio Tinto Co. Ld.* [43] In each case therefore before deciding "whether a contract is abrogated or merely suspended on the "outbreak of war it is essential to determine its exact construc- "tion and effect."

Lord Goddard cited the words of Lord Dunedin [44]: " 'It is

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[41] [1946] A.C. 219, 241.
[42] Ibid. 258.
[43] [1918] A.C. 260, 269.
[44] [1946] A.C. 219, 268.

" 'not every contract that is abrogated by the war; it is only a " 'contract which is still executory and which for its execution " 'requires' (I emphasize that word) 'intercourse between the " 'English subject and the enemy.' "

In *Joseph Constantine Steamship Line Ld.* v. *Imperial Smelting Corporation Ld.*,[45] Lord Simon L.C. said[46]: "In this "connexion it is well to emphasise that when 'frustration' in "the legal sense occurs, it does not merely provide one party "with a defence in an action brought by the other. It kills the "contract itself and discharges both parties automatically. The "plaintiff sues for breach at a past date and the defendant "pleads that at that date no contract existed. In this situation "the plaintiff could only succeed if it were shown that the determination of the contract were due to the defendant's 'default,' "and it would be a strange result if the party alleging this were "not the party required to prove it.

"The doctrine of discharge from liability by frustration has "been explained in various ways—sometimes by speaking of the "disappearance of a foundation which the parties assumed to "be at the basis of their contract, sometimes as deduced from a "rule arising from impossibility of performance, and sometimes "as flowing from the inference of an implied term. Whichever "way it is put, the legal consequence is the same. The most "satisfactory basis, I think, on which the doctrine can be put "is that it depends on an implied term in the contract of the "parties." The Lord Chancellor then drew attention to the difference between discharge by supervening impossibility and discharge by supervening illegality.

Ertel Bieber & Co. v. *Rio Tinto Co. Ld.*[47] is of importance, and I refer in particular to passages from the speech of Lord Sumner,[48] some of which have already been read in judgments which I have mentioned.

These authorities were relied upon by the plaintiffs in support of their claim that the contract of current account was abrogated by war: it became illegal to perform it. And it was said that there was no debt due at the time, no accrued liability, for there had been no demand, and no demand could be made at the Allenby Square branch after the expiration of the mandate, and thus it was claimed that there arose upon the defendants an obligation to pay the amount then standing to the credit of the plaintiffs on the principle stated by Lord Wright in the *Fibrosa* case.[49]

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[45] [1942] A.C. 154; 57 T.L.R. 485; [1941] 2 All E.R. 165.

[46] [1942] A.C. 154, 163.

[47] [1918] A.C. 260.

[48] Ibid. 285, 287, 288, 289.

The defendants had not sought on the trial to establish any custom, or called any evidence as to banking practice, but our attention was drawn to the way in which the money of an enemy in a current account was dealt with in this country. Under the powers given by section 7 of the Trading with the Enemy Act, 1939, S.R. & O. No. 1198 of 1939 was made, paragraph 1 of which provides: "Any money which would, but for the existence "of a state of war, be payable to or for the benefit of a person "who is an enemy, and any money which is to be deemed for "the purposes of the Act to be money which would, but for the "existence of a state of war, be so payable, shall be paid to the "custodian." By paragraph 1 (ii): "Without prejudice to the "generality of the foregoing paragraph, there shall be paid to "the custodian in particular any money which would, but for "the existence of a state of war, be payable to or for the benefit "of a person who is an enemy, by way of: . . . (*e*) debt, "including money in the possession of any bankers, whether "on deposit or current account or whether held in trust or in "custody for or for the benefit of an enemy." It was illegal to make payments to an enemy, and specific provision was made that any balance on the current account of an enemy should be paid to the custodian.

Sir Hartley Shawcross, for the defendants, submitted that the true doctrine as to the effect of war is not that it abrogates and destroys the contract itself, but that, subject to certain exceptions, it prohibits the further performance of a contract other than the right to a liquidated sum of money which will, whether strictly already a debt or not, be treated as a debt, the right to payment being suspended. I am not sure that this is completely in accord with the view expressed by Lord Sumner in the *Ertel Bieber* case.[50]

In *Bagley* v. *Winsome and National Provincial Bank*,[51] the Master of the Rolls referred to the fact that it has for a long time been well established (and it is common practice) that garnishee proceedings are available in the case of a current account with a banker, and that that was recognized by all three Lords Justices in *Joachimson's* case.[52] Now, under Ord. 45, r. 1, this form of attachment applies in the case of "debts owing or accruing." In the case of the current account with which we are immediately concerned the debt was not accruing: it was a debt "owing," though so long as the account was "current" it could not be recovered by action until there had been a demand.

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[49] [1943] A.C. 32, 61.

[50] [1918] A.C. 260.

[51] [1952] 2 Q.B. 236; [1952] 1 All E.R. 637.

[52] [1921] 3 K.B. 110.

The conclusion at which I have arrived on consideration of the authorities is that on the expiration of the mandate the contract of current account was abrogated; there remained a sum of money to the credit of the plaintiffs; with the abrogation of the contract there went the necessity for a demand; that was a necessary element in a current account but no more; the relationship of debtor and creditor remained, but the super-added obligations which go with the relationship in regard to a current account had gone, and the amount to the credit of the customer remained theoretically at the Allenby Square branch; by reason of the existence of war payment was suspended. That is how I regard the position. And in support of that view I refer again to the words of Lord Thankerton in *Schering's* case,[53] where he said: "I am inclined to agree with Sir Arnold McNair's "suggestion (Legal Effects of War, 2nd ed., at p. 93), 'that the "'distinction between "executed" and "executory contracts" "'may not be very helpful in this connexion and that it may "'be found safer to say that . . . the effect of the outbreak of "'war upon contracts legally affected by it is to abrogate or "'destroy any subsisting right to further performance other "'than the right to the payment of a liquidated sum of money, "'which will be treated as a debt and will survive the outbreak "'of war.'"

Parker J. based his decision on those words of Sir Arnold McNair, and, having regard to what I consider was the adoption of them by Lord Thankerton,[54] I think that he was right in so doing. The effect of the outbreak of war on this contract of current account was to "abrogate or destroy any subsisting right "to further performance other than the right to the payment of "a liquidated sum of money, which will be treated as a debt and "will survive the outbreak of war." The payment of the debt was suspended, and in due course under Israeli law the amount was collected by the custodian appointed in accordance with the law of that country.

A further point taken on behalf of the defendants is that if the contract was frustrated one cannot substitute an obligation which will enrich the enemy in just the same way—and that is what would happen if it were held that the amount was payable to the Arab Bank Ld. in England. The submission was put in this way: "If, contrary to the defendants' submission, the present "contract and all rights and obligations under it are to be considered as abrogated, it is only because the law of Israel treats "the contract as illegal, but it is no part of the law of Israel, "or of England, that a person who is by that law forbidden to "perform a contract for the payment of money to an enemy alien "is simultaneously placed under a present or any obligation of "law to pay the money otherwise due on the contract as money "had and received or as unjust enrichment. Any such rule would "immediately defeat the purpose of the primary rule from which "it was said to result and which had abrogated the obligation in "favour of the enemy. Moreover, such new obligation would "not have occurred before the war and would itself have been "abrogated by the very principles on which the appellants rely."

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[53] [1946] A.C. 219, 240.

[54] Ibid. 240.

I do not see any answer to this point. If there was frustration, but notwithstanding that an obligation was created under which the defendants were bound to pay at another place those who were enemies of Israel, the result would in effect be the same as if the balance was paid direct. It is impossible to conceive that the law of any country would create such an obligation.

For the reasons which I have given I feel that the appeal must fail. I reach that conclusion with some regret, for this appears to be a hard case, but that is not the fault of the courts of this country; it is one of the results of war.

JENKINS L.J. The question in the case is whether in view of the termination of the mandate, the events following such termination, and the legal consequences of those events, the defendants are still liable to pay to the plaintiffs the amount standing to their credit in their current account. [His Lordship stated the facts and continued:] The appeal falls to be determined on the footing that at the moment of the termination of the mandate the contract between the plaintiffs and the defendants, under which the plaintiffs' current account was kept at the defendants' Allenby Square branch, was a subsisting contract of which there had been no breach or repudiation by the defendants, and by virtue of which the plaintiffs were entitled to be paid by the defendants at their Allenby Square branch the amount of the balance there standing to the credit of the plaintiffs' current account upon making a demand to that branch for such payment.

On this footing it seems to me to be plain, and, indeed, it is not disputed, that if the termination of the mandate had been followed by the constitution, without any war, of the State of Israel and the plaintiffs' current account had continued to be kept as before at the defendants' Allenby Square branch down to the passing of the Israeli regulations relating to the property of absentees, the plaintiffs' credit balance would have vested in the custodian, and the payment of it to him by the defendants would have operated as an effective discharge to the defendants for the amount so paid. In this hypothetical state of facts the plaintiffs would admittedly have been absentees within the meaning of the regulations, and the credit balance on their current account with the defendants' Allenby Square branch, payable as it was at, and on demand made to, that branch, and therefore within the area to which the law of the State of Israel applied, would clearly have been property situated in that area in the form of a debt or an indebtedness to the "absentee" plaintiffs within the meaning of the regulations.

The plaintiffs, however, contend that the legal effect on the contract between the plaintiffs and the defendants, under which the plaintiffs' current account was kept at the defendants' Allenby Square branch, and on the balance standing to the credit of the plaintiffs in that account, of the war which contemporaneously with the termination of the mandate broke out between the Jews and the Arabs was such as to prevent this result.

The argument begins with the proposition (which is not in dispute) that the contract, and the balance standing to the plaintiffs' credit under the contract, became on the outbreak of war subject to the law of Israel in regard to trading with the enemy, inasmuch as the contract was one between persons (i.e., the defendants) carrying on business in Israeli territory and persons (i.e., the plaintiffs) residing and carrying on business in Arab territory (and therefore enemies of Israel) which involved payment of money by the former to the latter at a place in Israeli territory (i.e., the defendants' Allenby Square branch) on demand made by the latter to the former at that place.

The next proposition (also undisputed) is that the law of Israel in regard to trading with the enemy (apart from any local legislation) is the same as the common law of England. The common law of England in this regard is thus stated by Lord Dunedin in *Ertel Bieber & Co.* v. *Rio Tinto Co. Ld.*[55]: "My Lords, the

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[55] [1918] A.C. 260, 267.

" proposition of law on which the judgment of the courts is based " is that a state of war between this kingdom and another country " abrogates and puts an end to all executory contracts which for " their further performance require, as it is often phrased, commercial intercourse between the one contracting party, subject " of the King, and the other contracting party, an alien enemy, " or anyone voluntarily residing in the enemy country. I use the " expression 'often phrased commercial intercourse' because I " think the word 'intercourse' is sufficient without the epithet " 'commercial.' As to this I agree with the judgment of the " Court of Appeal in the case of *Robson* v. *Premier Oil and Pipe* " *Line Co.*,[56] where Pickford L.J., delivering the judgment of the " court, Lord Cozens-Hardy M.R., himself and Warrington L.J., " said: 'The prohibition of intercourse with alien enemies rests " 'upon public policy, and we can see no ground either on principle " 'or authority for holding that a transaction between an alien " 'enemy and a British subject which might result in detriment to " 'this country or advantage to the enemy is permissible because " 'it cannot be brought within the definition of a commercial " 'transaction.' That so expressed it is an incontrovertible proposition admits, I think, upon the authorities, of no doubt."

There are, however, certain exceptions to the general rule. Thus in the same speech Lord Dunedin said[57]: "There is " indeed no such general proposition as that a state of war " avoids all contracts between subjects and enemies. Accrued " rights are not affected though the right of suing in respect " thereof is suspended. Further, there are certain contracts, " particularly those which are really the concomitants of rights " of property, which even so far as executory are not abrogated. " Such as, for instance, the contract between landlord and " tenant, of which an example may be found in the recent case " of *Halsey* v. *Lowenfeld*.[58] In other words, the executory " contract which is abrogated must either involve intercourse, " or its continued existence must be in some other way against " public policy as that has been laid down in decided cases."

Lord Sumner in the same case, in a passage directed against the contention that a clause providing for the suspension of a contract in the event of war could displace the absolute abrogation which the law requires, said[59]: "The whole contract so far " as it is mutually executory is dissolved. Again, the suspension

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[56] [1915] 2 Ch. 124, 136.
[57] [1918] A.C. 260, 269.
[58] [1916] 2 K.B. 707.
[59] [1918] A.C. 260, 289.

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"of the right of suit in the case of enemy nationals, for causes "of action already accrued, until the conclusion of peace is "not an argument in favour of substituting suspension by agree-"ment for discharge by operation of law. Whether it sounds "in debt or in damages such a cause of action implies a "present obligation to pay simultaneous with its coming into "existence. Suspension of the remedy implies no continuance "of the contract during the war, but only a recognition of its "existence before the war as the basis of origin of a right, which, "when it has accrued, is a chose in action, a form of property."

The point in issue at this stage of the present case is whether the plaintiffs' right to payment on demand of the balance standing to the credit of their current account was within the exception from the general rule of abrogation accorded to accrued rights.

Sir Andrew Clark admitted that if the plaintiffs' right to the credit balance was an accrued right within the meaning of the exception, the appeal must fail, for on that view the legal effect of the war was not to abrogate it but merely to suspend its enforcement, in which case the credit balance remained in being after the outbreak of war as a debt owing in the State of Israel from the defendants to the plaintiffs, and accordingly vested in the Israeli custodian and was properly paid to him by the defendants.

Sir Andrew, however, submitted that the credit balance was not such an accrued right. According to him, it was merely an incident of a wholly executory contract between the defendants as bankers and the plaintiffs as current-account customers, under which the defendants undertook to perform banking services for the plaintiffs, and to pay on demand to the plaintiffs, or as they should direct, the whole or any part of the balance from time to time standing to the credit of the account, in return for the use of such balance allowed to them by the plaintiffs. This contract, said Sir Andrew, necessarily involved intercourse between the defendants and the enemy plaintiffs and therefore was wholly abrogated by the outbreak of war, such abrogation extending to the credit balance itself. Further, he said that as a demand was necessary before the plaintiffs could sue for the amount of the balance (see *Joachimson* v. *Swiss Bank Corporation* [60]) the plaintiffs' right to it was not an accrued right within the meaning of the exception which extended only to rights immediately enforceable by action either at or before the outbreak of war or on some then predetermined future date, and not to rights in respect of which a step involving intercourse with the enemy (such as a demand by the enemy for payment) was a necessary preliminary to suit. His submission, as I understood it, even went so far as to say, in effect, that unless and until the plaintiffs made a demand for payment, the credit balance was not a debt owing to, or in the nature of property owned by, the plaintiffs.

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[60] [1921] 3 K.B. 110.

I cannot accept that argument. It seems to me to confound the further performance of the contract, which was clearly abrogated, with the indebtedness of the defendants to the plaintiffs on the current account, which had in fact resulted from the operation of the contract down to the outbreak of war, and did not depend for its existence on any further performance of the contract after such outbreak. It seems to me impossible to dispute that if a demand for payment had in fact been made the instant before the outbreak of war, and while (so to speak) the manager of the defendants' Jerusalem branch was turning towards the safe to get out the money, war had broken out and prevented the payment being made, the credit balance would have constituted an accrued right within the meaning of the exception. This part of the plaintiffs' case therefore resolves itself into the narrow question whether the necessity for a demand before action to enforce payment prevented the credit balance from being such an accrued right. I cannot think that it did. Clearly no effective demand for payment could be made during the war, but for that matter nor could any effective action be brought to enforce payment during the war, nor could payment without action brought be lawfully made during the war. Of these three disabilities the second and third apply equally to a debt payable without any demand, which clearly would not be abrogated but only suspended in point of enforcement for the duration of the war; and I fail to see why the presence of the first, that is to say, inability to make an effective demand in the case of a debt payable on demand, should bring about cancellation as distinct from suspension.

The making of a demand in respect of a debt payable on demand is a step which (war apart) the creditor is free to take when he chooses. It is an assertion of a title, or proprietary right, already perfected by the lending of the money on terms that it is to be repaid on demand, and not an act by virtue of which the debt is brought into being. In my view, it is not open to doubt that a debt payable on demand, such as a credit balance on a current account, is property assignable by the creditor and passing under his will or intestacy. It is property in the shape of a debt or chose in action of a particular kind, that is to say, a debt payable on demand, which by the terms of the contract of loan has to be got in, or reduced into possession, in a particular way, that is to say, by making a demand for payment. It may be asked how the necessity for a demand, imposed as it is by the contract, can survive the abrogation of the contract's further performance. For my part, I think that the necessity for a demand should probably be regarded as surviving the abrogation of the further performance of the contract, not by virtue of the contract itself, which has gone, but as a characteristic, in the nature of a restriction on its recovery, inherent in the debt contracted as a result of the past operation of the contract. An alternative view, expressed by Singleton L.J., is to the effect that the abrogation of the further performance of the contract does away with the necessity for a demand, so that in the present case the position would be that at the outbreak of war the plaintiffs were left simply with a credit balance at the defendants' Allenby Square branch payable without demand. This alternative would clearly be destructive of the plaintiffs' case. But speaking for myself, I prefer the other alternative, and am content to assume that the necessity for a demand survived the outbreak of war just as a debt owing at the outbreak of war, and by virtue of the contract payable on a specified future date, would (though suspended in point of enforcement) survive as a debt payable on that date, and not be converted into a debt payable forthwith.

There is no authority directly in point, in the sense of a decision whether a credit balance on current account payable on demand is or is not an accrued right within the meaning of the exception; but I think strong support for the view that it should be so considered is to be found in *Schering Ld.* v. *Stockholms Enskilda Bank Aktiebolag.*[61] In particular, I would refer to the following passage from the speech of Lord Thankerton [62]: " I am inclined to agree with Sir Arnold McNair's " suggestion (Legal Effects of War, 2nd ed., at p. 93), ' that the " ' distinction between " executed " and " executory contracts " " ' may not be very helpful in this connexion and that it may be

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[61] [1946] A.C. 219.

[62] Ibid. 240.

" 'found safer to say that . . . the effect of the outbreak of war " 'upon contracts legally affected by it is to abrogate or destroy " 'any subsisting right to further performance other than the right " 'to the payment of a liquidated sum of money, which will be " 'treated as a debt and will survive the outbreak of war.' In " this view, I proceed to consider what is included in the phrase, " 'a liquidated sum of money, which will be treated as a debt.' " The appellants' counsel admitted that a debt payable by " instalments would be so included, and that provision for " discount on anticipation of the instalment dates would not alter " the position, nor would express provision for the acknowledg- " ment in writing of each sum paid affect the matter. In my " opinion the fact that the creditor held security for the payment " of the debt, which would fall to be restored to the debtor on " payment of the debt, would make no difference even though " the security had been absolutely assigned to the creditor, and " would require retransfer to the debtor. In my opinion, the " present case only raises one further point, namely, the fact " that the appellants were bound as principals to the respondent " bank, to discharge the debt in respect of which the German " company were the original principal debtors, and were there- " fore entitled under the April contract on payment to the " respondent bank of each instalment, to an assignment by the " latter of a like sterling amount of their claim against the " German company. My Lords, I cannot think that this makes " any difference to the position. The appellants, under the " April contract, were bound to discharge the whole debt within " a period which would terminate before the lapse of the eight " years, when the liability of the German company to make any " payment towards the debt would first arise; in other words, " the appellants were bound to acquire the debt, and their being " placed by assignment in the shoes of the respondent bank is " merely incidental to the discharge of the debt owed to the " respondent bank and is not different in substance from the case " of the return of securities to which I have already referred. " It is important to make clear that the principle of abrogation " does not involve destruction of the contract so far as already " performed. That which is abrogated is the further perform- " ance of the contract, as from the outbreak of war; or, as " Lord Dunedin expresses it in the passage already quoted, " the continued existence of the contractual relationship is " prohibited."

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Again, Lord Thankerton said[63]: "It seems clear to me that "this reservation included matters involving intercourse with "the enemy, but, as Lord Dunedin points out, the right of "action is postponed. It seems equally clear it might involve "substantial economic benefit to the enemy. The declaration of "Simonds J. contains no such reservation, and the result, in "my opinion, is to confiscate the right of debt, which had arisen "to the respondent bank on the delivery of the reichsmarks on "April 28, 1936. I am not aware of any precedent for such "confiscation, and it is clearly not justified under the decision of "this House in the *Ertel Bieber* case.[64] Indeed, it is inconsistent "with it. I may add that in the earlier case of *Esposito* v. "*Bowden*,[65] the performance of the contract had not commenced "prior to the outbreak of war."

Lord Russell of Killowen, who dissented, but to this extent agreed with the majority, said[66]: "Thus a contract which is "completely executed on one side, and under which nothing "remains to be performed except payment to be made by the "other of a liquidated sum whether already due, or debitum in "praesenti solvendum in futuro, is unaffected by the outbreak of "war. The payments cannot in fact take place between enemies "in wartime; so long as the war lasts the payment is suspended. "Nor is enemy property confiscated at common law by the outbreak of war, and consequently contractual rights and obligations "incidental to the ownership of property are not put an end to at "common law by the outbreak of war. The enforcement of them "during the war may be impossible but they will survive the war."

Lord Goddard said[67]: "It is beyond question that if the result "of performance of a contract would be beneficial to the enemy "or detrimental to this country the further performance is forbidden and the contract abrogated, though again rights, such as "debts, accrued before the war are unaffected. This is illustrated "by the order in the *Ertel Bieber* case[68] made by the Court of "Appeal and affirmed in this House. . . . Now one of the reasons "why a suspensory clause to operate in the event of war in a "contract for the sale of goods to an enemy will not save the "performance of the contract from abrogation as illegal is that "to ensure to an enemy a supply of goods or raw material after "the war is or may be to enhance his resources during the war. "If this consideration were taken to its full logical extent it might

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[63] [1946] A.C. 219, 241.
[64] [1918] A.C. 260.
[65] 7 E. & B. 763.
[66] [1946] A.C. 219, 248.
[67] Ibid. 269.
[68] [1918] A.C. 260.

"be said to apply to debts, as it would certainly be of some benefit "to an enemy to have an English debt remaining due to him "even though it is not payable till the end of the war. He might "be able to raise money from neutrals upon an assignment of his "rights which could be enforced at the conclusion of the war. "But this doctrine never has been applied to debts arising out "of previous contracts, and I am not prepared now for the first "time to apply it and to hold that accrued causes of action are "destroyed and not suspended because otherwise an enemy might "obtain a discount or some other benefit by reason of the con-"tinued existence of the obligation."

If, as was recognized in the case just cited, a debt contracted before the outbreak of war, but made payable by instalments on dates occurring after such outbreak, is not abrogated by such outbreak, but merely suspended as regards enforcement, and this notwithstanding the right of the debtor to an acknowledgment, and transfer of a security, upon the payment of each instalment, I fail to see why it should be held that a debt contracted before the outbreak of war should be cancelled merely because it is payable on demand. By parity of reasoning a credit balance kept by an enemy with a bank in this country on terms that it was to be payable against production of a passbook or deposit receipt would be cancelled by the outbreak of war. Once the exception of accrued rights is accepted, and once the basis of it, viz., that the law in its concern to prevent benefit to enemies does not go the length of confiscating enemy property, is recognized, I see no reason in principle or common sense why a debt for the recovery of which some formality, such as a demand for payment or the production of some indicia of title, is made requisite, should on that ground be excluded from the benefit of the exception. This would, indeed, be nothing more or less than the very confiscation of proprietary rights which the law declines to countenance.

Accordingly, I am of opinion that the plaintiffs' credit balance in this case was not cancelled by the outbreak of war, but remained in existence subject to the suspension for the duration of the war of the plaintiffs' right to recover it.

On this aspect of the case I find myself in complete agreement with the reasoning and conclusions of the judge; and in particular I would record my approval of the observation he quotes from Sir Arnold McNair's Legal Effects of War, 3rd ed., at p. 121: "It is inconceivable that upon the outbreak of war "an English banker's obligation towards an enemy customer is "ipso facto destroyed."

It follows that in my opinion the appeal must fail.

This makes it unnecessary for me to consider at length the second stage in Sir Andrew Clark's argument, which was to the effect that the cancellation of the credit balance gave rise to a right in the plaintiffs to recover a like amount from the defendants as money had and received, or alternatively, on the ground that the defendants were "unjustly enriched" to that extent by the cancellation of their contractual indebtedness. This argument is founded on *Fibrosa Spolka Akcyjna* v. *Fairbairn Lawson Combe Barbour Ld.*[69] But even if, contrary to my opinion, the plaintiffs' credit balance was cancelled by the outbreak of war because it was not an accrued right, but part and parcel of an executory contract the further performance of which was rendered unlawful by the outbreak of war and therefore abrogated, I am by no means satisfied that the principle of that case would give the plaintiffs the substituted non-contractual right which they claim. If a trader (say in Germany) agrees to buy from another trader (say in Britain) goods for which he pays in advance, and before the goods are supplied war breaks out between Britain and Germany, further performance of the contract is abrogated and the British trader is forever absolved from supplying the goods; indeed, it would be illegal for him to do so. But (as I understand the principle) the German trader by virtue of the payment made by him of the price of the goods before the outbreak of war has from the instant of the outbreak of war a right to repayment of the money, as money paid for a consideration which has wholly failed, arising contemporaneously with the abrogation of the further performance of the contract. This seems to me to be a species of accrued right which, though suspended in point of enforcement during the war, is not abrogated. The law does not say to the German, "You shall have "the goods after the war." It says, "Because you cannot have "the goods you shall have back after the war the money you "paid before the war as the price of the goods which the war "prevented you from receiving."

But in the present case the contract, which, according to Sir Andrew's argument, is abrogated, is a contract to repay on demand money lent, and the outbreak of war has made it illegal for the debtor to repay that money. I fail to see how in those circumstances the law can sensibly say to the debtor: "You "must not pay this debt. It would be illegal for you to do so.

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[69] [1943] A.C. 32.

"The debt is therefore cancelled, and not merely suspended, "because anything short of cancellation would aid the enemy. "Nevertheless, it would be unconscionable in you not to pay the "debt, which on grounds of public policy you are forbidden to "pay, and you are therefore enjoined to pay a like amount to "your enemy creditor, and that without any such demand or "other formality as was required of him in relation to the "recovery of the contractual debt which has been cancelled. "Your obligation to make this payment will, however, be "suspended during the war." This seems to me to be no more than a roundabout way of saying that the debt is not cancelled, but that the right to recover it is merely suspended for the duration of the war; the only difference between the contractual and non-contractual obligations being that, in so far as the need for a demand is dispensed with, the substituted obligation is more onerous to the Briton and more advantageous to the enemy German than the original obligation which (to prevent benefit to the enemy) the law was at pains to extinguish.

In a case in which the debtor was a British banker residing and carrying on business in England alone, and the creditor an enemy German, the law as Sir Andrew presents it would be futile, to say the least. But the whole object of the two stages of his argument turns on the circumstances that in the present case the defendants carry on business in the belligerent country concerned (*i.e.*, Israel) only through a branch, their place, or principal place, of residence being in England. In these circumstances Sir Andrew's preoccupation is to kill the contractual debt and its localization in Israel, and resuscitate from its ashes a claim for the same amount in a new guise in which it becomes a claim against the defendants simpliciter, as distinct from a claim against the defendants at their Jerusalem branch. In this form, according to Sir Andrew, the claim can be pursued in England against the defendants as resident here, and not being situated in Israel could not be caught by the Israeli regulations concerning the property of absentees, or suspended in point of enforcement during the Israeli-Arab war.

In such circumstances the law as Sir Andrew presents it would have the most extraordinary consequences. Suppose a Swiss bank with a branch in London. Suppose a German has a credit balance on a current account kept by him with the London branch of the Swiss bank. Suppose a war breaks out between Britain and Germany, Switzerland remaining neutral. According to Sir Andrew's theory English law, to prevent benefit to the

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enemy, cancels the German's credit balance at the Swiss bank's branch in London, and at the same time presents the German enemy with an immediate right to recover the amount of the credit balance by suing the Swiss bank in Switzerland. This seems to me to involve a complete stultification of the common law in regard to trading with the enemy, and a complete negation of the considerations of public policy on which it is based.

An interesting argument was presented to us as to the local situation of the resuscitated claim, supposing such a claim to exist. As to that, I need only say that the claim as formulated by Sir Andrew was by definition situated outside Israel; but that if the cancellation of the contractual debt was brought about by Israeli law, it would at least be logical also to look to Israeli law for the consequences of such cancellation, and to regard any substituted obligation as the creature of that law, and consequently as situated in the country to whose law it owed its existence. It is, however, unnecessary in the view I take to give any decided answer to this hypothetical question, and I refrain from doing so.

For the reasons above stated I would dismiss this appeal.

Morris L.J. When the plaintiffs presented their case at the trial of the action it was based first and foremost on an alleged breach of contract before the mandate came to an end. It was said that the plaintiffs had up to May 13 persisted in an oral demand for payment of the balance of their account, and that such demand had never been met and that the contract of current account had been repudiated. After full and careful inquiry the judge was satisfied that there was nothing which could be said to amount to a demand the non-compliance with which would amount to a breach. In the result, it was held that before the termination of the mandate there had been no breach of contract on the part of the defendants and no frustration. The plaintiffs do not on appeal challenge these conclusions, but they challenge the conclusion reached by the judge that their credit on current account was a liquidated sum of money the right to payment of which was not wiped out by the outbreak of war but was merely suspended.

Having failed to establish that they had made demand, the plaintiffs submit that in the circumstances of the case their contract of current account was frustrated when war broke out, with the result that no money was owing to them by the defendants. They submit that where a customer has a balance on current account with a banker, and has not made a demand, there is no debt at all owing by the banker, and that if banker and customer become separated by the line of war so that intercourse between them is illegal, then their contract is at once abrogated and any credit on current account expunged. The plaintiffs submit that this is what happened as soon as war broke out following upon the termination of the mandate. But they contend that the matter does not rest there; they submit that the law steps in again and does so by way of giving redress against the injustice of the enrichment which suddenly devolved upon the defendants who would neither have expected nor desired to be enriched. The redress, it is said, would take the form that a new obligation would be imposed by law—an obligation to pay as a simple debt (which they would owe at the place where they reside) the amount which had previously stood to the credit of the plaintiffs on current account. In the result, therefore, the plaintiffs say that whereas before war broke out they could at Allenby Square, Jerusalem, have demanded payment of the amount standing to their credit, the position immediately after war broke out was that the defendants in London owed the amount to the plaintiffs and had the obligation to seek them out and to pay them.

The structure of the propositions so advanced requires testing. If correct, a strange result would follow, for the law (the law of Palestine or Israel, which it was agreed did not differ from English law) would prohibit the defendants from paying the plaintiffs, because to pay them would involve intercourse across the line of war and would delete the debt, but nevertheless, in defiance of the prohibition and deletion and of their purpose and reason, the law would require the defendants to pay the plaintiffs. The submissions seem to require the law to function in an erratic and quixotic manner and to alternate between destructive and creative effect.

It is necessary to consider what the position was between the plaintiffs and the defendants immediately before the war began. It was that the defendants owed a sum of money to the plaintiffs in the way in which a banker owes to a customer who is in credit. In addition, the parties were mutually willing to continue to have the banking transactions denoted by the terms of the plaintiffs' letter of February 14, 1939, and by the course of their dealings. The nature and features of the relationship between banker and customer were detailed by Atkin L.J. in *Joachimson* v. *Swiss*

Bank Corporation.[70] It has never been doubted that the relation between banker and customer is that of debtor and creditor, though there are, of course, superadded obligations. But I cannot think that it is correct to say that a contract of current account remains wholly executory until the account is closed or until an effective demand for payment of the whole balance has been made. The position at any given time is that many transactions will have been concluded and ended and that further transactions are anticipated, and that if a customer is in credit, he is so because he has paid money to the banker so that a debt becomes owing by the banker to the customer which will be payable on demand.

As between the plaintiffs and the defendants the position at the time of the outbreak of war was that the defendants owed a large sum to the plaintiffs, the debt being payable at Allenby Square, Jerusalem, and being payable on demand. The plaintiffs had a right to make demand for payment. It seems to me that that was a form of, and a right of, property. It has been the policy of the law not to confiscate enemy property on the outbreak of a war, and there is certainly no justification for the confiscation by private persons of enemy property which they may happen to hold. Nor does an existing liability to pay money to an enemy become terminated. It would therefore appear to be a strange and irrational result if after war broke out in Palestine the defendants became relieved of the debt which they owed. The debt was owing and was unquestioned, and would at any time on demand have been paid. The plaintiffs had money owing to them and could themselves have chosen the time to ask for payment of it. It cannot be said that they only had a property right if and when they made demand, but no property right before such time. Either before or after a demand they had a property right: in the one case the money would be immediately payable, and in the other case it would await an indication of their wishes as to the moment when it was to be paid. It seems to me, therefore, that it would be a departure from principle as well as a violation of reason if it were held that after the outbreak of war the debt owed by the defendants to the plaintiffs became expunged. It would be strange and mercurial to eliminate a liability which the debtor would not wish to disown and then to fix him with a new and different obligation on the footing that he had been unjustly enriched. Unless directed by principle or by authority, it seems to me a pointless and profitless procedure for the law artificially to create a void and then to proceed artificially to fill it.

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[70] [1921] 3 K.B. 110.

In *Hugh Stevenson & Sons* v. *Aktiengesellschaft für Cartonnagen-Industrie*[71] Lord Finlay L.C. referred[72] to "the principle "that the property of an enemy is not confiscated, though his "right to have it back is suspended during war"; and he said[73]: "It is not the law of this country that the property of enemy "subjects is confiscated. Until the restoration of peace the "enemy can, of course, make no claim to have it delivered up "to him, but when peace is restored he is considered as entitled "to his property with any fruits which it may have borne in the "meantime." To the same effect was the statement of Lord Haldane[74]: "The law of this country does not in general "confiscate the property of an enemy. He cannot claim to "receive it during war, but his right to his property is not "extinguished; it is merely suspended."

It is said by the plaintiffs, however, that as they had not made a demand before the outbreak of war, the result was that they had no accrued right which could survive in suspension, but that their contract with the defendants remained mutually executory, and so was dissolved on the outbreak of war. In his speech in *Ertel Bieber & Co.* v. *Rio Tinto Co.*[75] Lord Dunedin said[76]: "There is indeed no such general proposition as that a "state of war avoids all contracts between subjects and enemies. "Accrued rights are not affected though the right of suing in "respect thereof is suspended." In his speech in the same case, Lord Sumner said[77]: "Again, the suspension of the right of suit "in the case of enemy nationals, for causes of action already "accrued, until the conclusion of peace is not an argument in "favour of substituting suspension by agreement for discharge "by operation of law. Whether it sounds in debt or in damages "such a cause of action implies a present obligation to pay "simultaneous with its coming into existence." The plaintiffs submit that as they had not made a pre-war demand, they did not have a cause of action which had already accrued before the war.

But Lord Sumner spoke of the existence of a cause of action as implying an existing obligation to pay, and the important consideration is as to the effect of war on such an obligation. Just as "accrued rights" under a contract are not affected, so such an obligation is not destroyed. In tune with this principle it seems to me that an existing or accrued right to demand payment of a sum of money which is owing ought not to be destroyed though it will be suspended.

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[71] [1918] A.C. 239.
[72] Ibid. 245.
[73] Ibid. 244.
[74] Ibid. 247.
[75] [1918] A.C. 260.
[76] Ibid. 269.
[77] Ibid. 289.

Under Ord. 45, r. 1, the court may, upon proof "that any "other person is indebted to such debtor . . . order that all "debts owing or accruing from such third person . . . to such "debtor" shall be attached. If a debtor has a bank balance, the bank is regarded as "indebted" to the customer and the credit balance would be a debt "owing or accruing."

If the line of war divides a creditor from one who owes him a debt which is both due and payable, the latter as debtor could not discharge his obligation of seeking out his creditor, for to do so would involve unlawful intercourse. Yet the debt is not expunged but is merely suspended. This serves to illustrate that the policy of the law is to avoid the confiscation of property even if there is some outstanding duty which would or might for its performance require intercourse across the line of war.

In his speech in *Schering Ld.* v. *Stockholms* [78] Lord Russell of Killowen, who dissented from the majority, but not apparently in regard to the principles of law, said [79]: "Thus a contract "which is completely executed on one side, and under which "nothing remains to be performed except payment to be made "by the other of a liquidated sum whether already due, or "debitum in praesenti solvendum in futuro, is unaffected by the "outbreak of war. The payments cannot in fact take place "between enemies in war time; so long as the war lasts the "payment is suspended. Nor is enemy property confiscated at "common law by the outbreak of war, and consequently contractual rights and obligations incidental to the ownership of "property are not put an end to at common law by the outbreak "of war. The enforcement of them during the war may be "impossible, but they will survive the war." It is to be observed that in the above-cited passage Lord Russell includes within the words "liquidated sum" a sum which though "debitum in praesenti" is "solvendum in futuro." He was speaking in reference to a contract which was completely executed.

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[78] [1946] A.C. 219.

[79] Ibid. 248.

The Mode of Citation of the Volumes of the *Law Reports* commencing January 1, 1953, will be as follows:—

In the First Series,
[1953] Ch.

In the Second Series,
[1953] 1 Q.B. [1953] 2 Q.B. [1953] P.

In the Third Series,
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Regina *v.* Comptroller-General of Patents and Designs. *Ex parte* Parke, Davis & Co. **C.A. 48**

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Svenska Traktor Aktiebolaget *v.* Maritime Agencies (Southampton) Ld. **Pilcher J. 295**

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2. —— *Purchase notice—"Owner" of land—Notice by freeholder not entitled to rack rent—Duty of Minister—Town and Country Planning Act*, 1947 (10 *&* 11 *Geo.* 6, *c.* 51), *ss.* 19 (1), 119 (1).
Regina *v.* Minister of Housing and Local Government. *Ex parte* Corporation of London - - - - - - **Divl.Ct. 83**

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Lester *v.* Balfour Williamson Merchant Shippers Ld. - - - - **Divl.Ct. 168**

IBL.
LONDIN.
UNIV.